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PUBLISHED, WITH NOTES, REFERENCES, AND TABLES OF THE NAMES OF THE CASES, AND OF THE PRINCIPAL MATTERS,

BY HIS SON,

WILLIAM PEERE WILLIAMS,

OF THE INNER TEMPLE, ESQ.

EDITED (IN 1787 *AND* 1793*) WITH ADDITIONAL REFERENCES TO THE PROCEEDINGS IN THE COURT, AND TO LATER CASES,*

BY SAMUEL COMPTON COX,

OF LINCOLN'S INN, ESQ.

NOW ONE OF THE MASTERS OF THE COURT OF CHANCERY.

THE SIXTH EDITION,

WITH REFERENCES TO THE MODERN CASES,

BY JOHN BOSCAWEN MONRO, WILLIAM LOFTUS LOWNDES,

AND

JAMES RANDALL,

OF LINCOLN'S INN, ESQRS. BARRISTERS AT LAW.

IN THREE VOLUMES.

VOL. I.

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TO

THE RIGHT HONOURABLE

THE LORD HARDWICKE,

LORD HIGH CHANCELLOR OF GREAT BRITAIN.

My Lord,

I here presume, under your Lordship's patronage, to offer to the publick the following Reports, which might have appeared with more advantage, had the Author lived to put them to the press: But your Lordship will, I hope, be the more readily induced to pardon this address, that the great name and reputation of the patron may protect the work from the censure to which it would otherwise be exposed.

I know your Lordship's sentiments, and the value of your time too well, to attempt a long discourse in the usual stile of Dedications: Give

me leave therefore only to add, that how great soever the number may be of those who profess to respect and honour you, there is not one that does so with more sincerity than,

My Lord,

Your Lordship's

Most Obedient

Humble Servant,

William Peere Williams.

PREFACE

TO

THE FOURTH EDITION.

In preparing the fourth edition of the present work, the principal object has been the examination of the several reported cases, as they are found in the Register's Books or other proceedings in the court, with a view, not only of pointing out those few which appear to be materially incorrect or imperfect, but also of authenticating those which (although truly reported) have been impeached by the decision, or doubted in the discussion, of later cases. In many instances, the result of former researches appearing in printed books of authority, or the unimportance of the subject at this time, has made any inquiry on the present occasion unnecessary; in others, the nature of the proceedings themselves, or the neglect of the parties to draw them up, has prevented their appearing on record; but the editor cannot take upon himself to say, that, of those which he has been unable to find, there may not be some existing under different names or of different dates. Of those which he has met with, he has subjoined such parts as seem material for either of the above mentioned purposes; where no such reason occurs, he has only referred to the record, &c. which may serve, as well to shew that the particular case has been examined, as to save some trouble to those who may wish hereafter to make a more particular enquiry.

The editor has also endeavoured to collect the principal cases which have been determined since the original publication of these reports, relative to the several subjects therein considered;—and in so doing, he found so much difficulty in making the points of the cited cases distinct and intelligible by a bare reference to printed books, that he has been induced to mention in short terms their principles and general tendency, and has thereby made greater additions (occasionally) than he at first intended, or ever wished, to have done;—but as the positions so inserted are meant only as the result of the cases which they accompany, and as they are wholly omitted where the authorities so far disagree as to make such result doubtful, it is hoped they will appear in their proper light, and merely as subservient to the former designs.—Where the same point has occurred more than once in the course of the three volumes, repetitions have been avoided as much as possible, by references to some one place, assisted by the additional tables prefixed to the present edition.

The whole of the original text and notes has been left entire, except in cases of evident mistake; the pages have been preserved; and the mode of printing immediately points out the additions now made. With these precautions, the editor hopes that the utility of the original work cannot be lessened by his interference.

TO

SAMUEL COMPTON COX, Esq:

ONE OF THE MASTERS OF THE HIGH COURT OF CHANCERY,

THIS NEW EDITION

OF A WORK ON WHICH HIS OWN LABOURS HAVE BEEN

SO SUCCESSFULLY EMPLOYED,

IS INSCRIBED

BY

HIS FAITHFUL SERVANTS,

J. B. MONRO,
W. L. LOWNDES,
J. RANDALL.

ADVERTISEMENT

TO

THE SIXTH EDITION.

In this Edition, the Statement of those original Cases contained in Mr. Cox's Notes to the fifth Edition, which have been since published by him in his *Cases in Equity* has been omitted, and a reference only given to them as there reported, pursuant to his own plan as stated in the Preface to that Book. In all other respects Mr. Cox's Notes are preserved entire. They are referred to by figures, and separated by a single line from the text, and the notes of the original Editor. The notes of the present Editors are placed under a double line, and are referred to by the last letters of the alphabet. The tables of the principal matters given by the original Editor at the end of each Volume have been thrown into one, which is placed, together with an Index to the notes both of Mr. Cox and the present Editors, and a list of cases referred to in those notes, at the end of the third Volume.

A

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N. B. Where *versus* follows the First Name, it is that of the Plaintiff; where *and*, it is the Name of the Defendant.

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DE

TERM. PASCHÆ, 1695.

HYDE *versus* PARRAT *&* al'.

CASE 1.
LORD KEEPER SOMERS.
2 Vern. 331.

ONE *Hyde* of *Hoddesdon* (*in com' Hertford*) by will dated—*September* 1687, (*inter al'*) devised his household goods in his dwelling house at *Hoddesdon* unto his wife *Margaret Hyde* for her life, and after her death to his son *Joseph Hyde*, and died, having made one *Parrat*, his son-in-law, executor. The son *Joseph Hyde* brought his bill in equity against *Margaret Hyde* and *Parrat*, to have an inventory of these goods; and that *Margaret Hyde* should give security, that they, at the time of her death, should be forth-coming to the plaintiff, and not be imbeziled.

A. devises household goods to his wife for life and afterwards to his son. The court allowed this a good devise over; and to be the same as if the devise had been only of the use of the goods to the wife for life.

The cause coming on to be heard before baron *Powell*, he reserved it for the opinion of the Lord Keeper *Somers*, whether this devise over of the goods was void? Whereupon the cause was heard before the Lord Keeper, when the only question was, whether this devise of the goods to one for life, with remainder over, was not void as to the remainder, it not being by way of *use?*

1915. 1. Ch. 830.

[2]

And I argued, that this devise over was void; insisting, *first*, upon the reason of the thing: *secondly*, upon the authorities in point: and *thirdly*, that if such devise over was void at law, there was no reason that equity should support it, or, in this case, vary from the law. Even in the case of a chattel real, where it has been devised to one for life, the remainder over, such remainder has formerly been held void, as in Dyer 74, and in *Child* and *Bayley's* case, Cro. Jac. 461, where it is said by the court, that if *Matthew Manning*'s case (*a*) had been *res integra*, the construction there made would hardly have prevailed: But since it had been adjudged, they would not disturb it. Now there is not near so much reason to support a devise of a personal chattel to one for life with remainder over,

(*a*) 8 Co. 94. b.

HYDE *v.* PARRAT & al'.

as there is to support a devise of a chattel real, made in that manner: for, *first*, personal chattels are liable to be lost, stolen, or burnt: but lands, or other things, of which real chattels consist, are not subject to such casualties; and therefore no reason that the one should endure so large a limitation as the other.

Secondly, Out of a chattel real lesser estates or interests may be derived; as lessee for years may make a lease at will, or an under lease for years and grant the remainder or reversion over; but the interest of a personal chattel cannot be so divided: neither (strictly speaking) can a man be said to have an estate in a personal chattel; for that which is called an *estate* in lands and tenements, is termed a *property* (and not an estate) in personal chattels; the law considering the first as permanent, the other as temporary and precarious. It is
[3] true, the books say, if I devise the *use* of a personal chattel to one for life, and after to another, this devise over is good: but the same books also say, that if the first devise be of the goods *themselves* (as in the principal case) the devise over is void; and there seems to be some reason, from the rules of law, to maintain that diversity; for where the goods themselves are devised to one for life, and after to another, the devise over, according to the rules of law, cannot take effect; the devise or grant of a personal thing to one for an hour or minute, being a gift for ever, and an absolute disposition of the entire property to the first person. But where the devise is only of the *use* of the goods to one for life, and after to another; here the first devisee has not the property of the goods, but only a special interest in them; and still there remains a property, which may be given over.

As for authorities, there are as many upon this point, as in any case in the law. In 37 Hen. 6. (abridged in Bro. Devise 13.) the devise was, that *A.* should *use* the book called the *Graile* for his life, and that afterwards *B.* should use it; and it was agreed that the devise over was good; the first devise being of the *use* only; but (says the book) if the first devise had been of the *thing itself* to one for life, and after to another, then the devise over had been void; and the lord C. J. *Brooke* does so much approve of this distinction, as in his abridgment of the case to call it *valdè bone diversitie:* And the same case is cited by the lord C. J. *Popham.* In Plowd. 521, 522. (*Weldon* versus *Elkington*) and in 33 Hen 8. (as appears in Brooke's New Cases, sect. 334.) the same difference is taken; and so in 2 Ed. 6. Brooke's New Cases, sect. 388. In Owen 33.

(7 Eliz.) this diversity is taken betwixt the devise of the *use* of the thing, and of the thing itself, and so far prevailed, that the lord *Fitz-James*, who was chief justice of *England*, did by his will devise the *use* of his jewels and plate to *Nicholas Fitz-James* and the heirs male of his body (which might indeed be straining it somewhat too far), yet in that case, the lord *Dyer* and the court held, that *Nicholas Fitz-James*, the devisee, had no property in the jewels or plate. In 1 Roll's Abr. 610. (5 Jac. 1.) it is agreed *per curiam*, that in case of a devise of a personal chattel to one for life, the remainder over, this devise over is void. In Cro. Car. 346. (9 Car. 1.) Lord *Hastings* versus Sir *Archibald Douglas*, the same distinction is made betwixt the devise of the use of a personal chattel to one for life, the remainder over, and the devise of the thing itself. In March 106. (17 Car. 1.) there is the same case with this in all its circumstances: certain goods were devised to *A.* for life, the remainder over, and (as in the principal case) the devisee over brought his bill in equity to compel the devisee for life to give security, that these goods upon the death of the devisee for life, should come to the plaintiff: and this bill was brought in the court of equity of the *Marches of Wales;* but the court of *C. B.* granted a prohibition, resolving the devise over to be void, and making the same distinction betwixt the devise of goods themselves and the use of the goods; and this, says the book, was done upon consideration.

HYDE v. PARRAT & al'.

[4]

Wherefore if the law be so, that the devise over of the goods, in the principal case, is void, (as is fully proved by the judgments and opinions of many judges in many successive reigns) then the only remaining question is, whether equity will in this case interpose in favour of the devisee over, and in prejudice to the first devisee, so as to take from him the absolute property which the law gives him? Now it is a settled rule in equity, that where there is no purchaser or creditor in the case, but both parties concerned are volunteers (as both the devisees are in this case) equity will not hurt, nor prevent either of them from enjoying that advantage which he has at law; and this is the foundation upon which many solemn decrees have been made. Whereas it cannot on the other hand, be pretended to have been settled in equity, that such devise over is good; though perhaps there may have been some decrees to that purpose which have passed *sub silentio:* but the last case of this nature was that of the dutchess of *Albemarle* (*a*), upon the late

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(*a*) 2 Vern. 245.

HYDE *v.* PARRAT *&* al'. duke of *Albemarle*'s devise of his jewels and plate; which point the court did not resolve but left as a doubt. And so I concluded that the devise over was void.

Sir *Thomas Powis è contra* cited some precedents, where it had been determined in favour of such devise over of personal goods; particularly the case of *Vachel* and *Vachel* (*b*), decreed in this court;† adding, that however it might have been determined, had this been the case of a grant, yet where the thing passed by way of devise or trust, the modern practice had been to admit of a limitation over after an estate for life, with respect to personal chattels.

(*b*) Cases in Chan. 129.

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† The other precedents cited by the counsel for the plaintiff on this occasion were, *first*, the case of *Catchmay* versus (1) *Nicholls, Morgan et al'*, heard first at the Rolls in *July*, 26 *Car'* 2. and in the *October* following before the Lord Keeper *Finch*, where *Ann Catchmay*, by her will, dated *August* 1662, made her sister *Catherine Catchmay* executrix, and bequeathed her whole estate (consisting of personal things) to her, for and during the term of her natural life, and after her decease her will was, that (*inter al'*) the sum of 400*l.* should be given to the daughters of *Christopher Catchmay*, being the plaintiffs and nieces to the testatrix, by equal portions, and if the said *Catherine* should die before the children should come of age, then the said 400*l.* to be paid into the hands of the defendant *Morgan*, whom she appointed to see her will performed; *Catherine* died before the children came of age, and left the defendant *Judith*, wife of the defendant *Edward Nicholls*, executrix; after which the children of *Christopher Catchmay* coming of age, brought their bill for their respective shares of the 400*l.* The defendant's counsel insisted, that this was a void devise to the plaintiffs, being the remainder of a personal thing after the death of another, to whom the same was given before, and the question then arising on the words of the will, it was ordered that the parties should attend Mr. Justice *Ellis* with the said will, in order that he might peruse the same, and deliver his opinion on the point aforesaid; who certified his opinion, that the plaintiffs ought to have relief for the 400*l.* legacy given them by the said will. On the 27th of *July*, the cause coming on again on the said certificate, *His Honour* ordered the defendant *Nicholls* to pay to the plaintiffs the said 400*l.* with interest from the time of the bill. Afterwards the *Lord Keeper*, on an appeal, though he differed from the *Master of the Rolls* as to the manner of relief, yet concurred with him, that the plaintiffs ought to be relieved for the several legacies given them by the will (and for which the said *Catherine* was in nature only of a trustee), to be paid after her death.

2*dly*. That of *Shirley et al'* versus *Ferrers et al'*, heard the 28th of *May*, 2 Gul. & Mar. which was thus:

John Ferrers, esq. the plaintiff *Anne*'s late grandfather, being seised in fee of the several manors and lands in the bill mentioned, (*inter al'*) devised to the defendant the lady *Ferrers* for her life, as an addition to her jointure, the castle, manor and honour of *Tamworth*, and also *his goods and furniture* in *Tamworth* castle, and by his said will desired, that the goods and furniture might be preserved for the heir, so that the children which she had by the plaintiff's father might enjoy the same, appointing the said lady *Ferrers* executrix. The bill (*inter al'*) was to have the goods and furniture at *Tamworth* castle inventoried and preserved for the plaintiff *Anne*; whereupon, as to the goods and furniture, it was ordered by the Lords Commissioners, that an inventory thereof should be taken and delivered to the Master by the defendant, of which goods, &c. she to have the use during her life, after which they were to be delivered and remain to the plaintiff's use and benefit.

(1) Ca. temp. Finch.

The *Lord Keeper* took time to consider of it, and afterwards, on the strength and authority of the late precedents, which had followed the civil and canon laws, in construing the *use* of the thing, and not the thing itself to pass, where the first devise is for a limited time, in order the better to comply with the intention of the testator, allowed the devise over to be good.† HYDE *v.* PARRAT *&* al'.

† And thus it is now settled. *Vide* post. 500. the case of *Tissen* versus *Tissen*, and *Upwell* versus *Halsey*, post. 651. (1)

(1) *Vide* Harg. Co. Litt. 20. *a.* the latter part of note 5.—and *Foley* v. *Burnell*, on the first argument in Hil. Term, 1782. 1 Bro. C. C. 274, in which case goods devised to one for life with remainders over, were taken in execution for the debt of the devisee for life, and the nature of the property which a devisee for life has in personal chattels, and the remedies of the remainder-man were very fully discussed. (*z*)

(*z*) *Et vide* S. C. on appeal, 4 Toml. P. C. 319. and S. P. on a writ of error to reverse a decision of the Exch. Chamber on an action of trover brought for the same goods, 4 Toml. P. C. 34. But *semble*, that a gift for life of things, *quæ ipso usu consumuntur*, as corn or wine, *if specific*, is a gift of the property and the old rule will prevail; but, *if residuary*, the things must be sold, and the interest of the produce paid to the legatee for life. *Randall* v. *Russell*, 3 Mer. 190. And see *Carr* v. *Erroll*, 14 Ves. 478.

DE TERM. S. MICHAELIS, 1695. *B. R.* [7]

PETIT *versus* SMITH.

CASE 2.

A MAN having a daughter and two brothers made his will, and thereby gave 5*l.* a-piece to his brothers, appointing them executors, but made no disposition of the surplus. Comberb. 378. Com. Rep. 3. 5 Mod. 247. Lord Raym. 86.

Where an executor has an express legacy, the court of Chancery looks upon him as a trustee with regard to the surplus, and will make him account, altho' the spiritual court has no such power. (2)

(2) This point has been so determined in *Rackfield* v. *Careless*, post. Vol. II. 158, (and the same case 1 Stra. 568, by the name *Rusdell* v. *Carnesse*)—*Davers* v. *Dewes*, post. Vol. III. 40. *Cook* v. *Walker*, 2 Vern. 676. where a *pecuniary* legacy has been given to a sole executor. So, where equal *pecuniary*

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On the death of the testator, the daughter, as next of kin, libelled in the spiritual court against the executors, to have the residue of the personal estate; it appearing (as was suggested) by the express legacies given to the executors, that they were to have nothing farther; and in the spiritual court the daughter recovered a sentence for the residue of the personal estate; from which the executors appealed to the delegates, and now moved in *B. R.* for a prohibition to the same delegates.

Sir *Bartholomew Shower* urged, that here being a will, and executors made, the spiritual court could not dispose of any thing from the executors; nay, that even where the party died intestate, the spiritual court could not, before the late act of 22 & 23 Car. 2. cap. 10. compel a distribution: and if it could not take any of the personal estate from the administrator, who was the creature of the ordinary (*a*), much less had it any such power in a case where there were executors. That it was true, in *Foster* and *Munt's* case (*b*) in chancery, it had been decreed, the executors should not have the surplus; but there five witnesses expressly swore, that the testator had declared his executors should not have more than the particular sums bequeathed to them.†

(*a*) Post. 42. Blackborough *v.* Davis.

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(*b*) 1 Vern. 473.

Holt C. J. The daughter, not being residuary legatee, can have no pretence of suing for this surplus in the spiritual court: on the contrary, the testator's having appointed his brothers

† The fact here mentioned does not appear; and though it has been frequently said, that this decree was founded on the fraud made use of by the executors, in insinuating themselves into their testator's favour, and prevailing with him to execute his will at a tavern, (*vide* post. 116.), which indeed appears by the register's book to have been charged in the bill, and insisted on by the counsel for the plaintiffs at the bar; yet it seems as if no fraud was proved; since the reason of the Lord *Jeffery*'s decree is expressed to be, "Because the words of the will "amounted to a declaration of trust; it being plain the testator never designed the "surplus of his estate (upwards of 5000*l.*) should go to his executors, for that he "gave them 10*l.* a-piece which excluded them from any property the law might "cast upon them."

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legacies to two or more executors, *Foster* v. *Munt*, 1 Vern. 473, and 2 Vern. 676. Lord *Bristol* v. *Hungerford*, Pre. Cha. 81. and post. Vol. III. 194 (note). *Farrington* v. *Knightley*, post. 544. *May* v. *Lewin*, post, Vol. II. 162. *Andrew* v. *Clark*, 2 Vez. 162. So where *specific* legacies are given to one or more executors, *Randall* v. *Bookey*, 2 Vern. 425. *Shrimpton* v. *Stanhope*, 3 Atk. 230. *Southcot* v. *Watson*, 3 Atk. 226. *Martin* v. *Rebow*, 1 Bro. C. C. 154. *Sed vide* the several distinctions, which have from time to time been taken in cases on this subject, more fully in *Farrington* v. *Knightley*, post. 544.

executors is a gift to them of the residue, after debts and legacies paid. At common law, before the statute ordered administration to be granted, the ordinary appointed committees of the personal estate, and in those times it was the practice to compel such committees to distribute: but afterwards, when the ordinary by virtue of the act of parliament (*a*) granted administration, this administrator had all the power of an executor, and being in nature of an executor, it was adjudged, that he was (*b*) not compellable to make distribution; which being thought hard as to those of kin to the intestate in equal degree, the statute of distribution was made. So that what is said in 2 Inst. 33, "that an executor or administrator having paid all debts, legacies, and funeral expences, "is compellable to divide among the next of kin," seems not to have been thoroughly considered.

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(*a*) 31 Ed. 3. c. 11.

(*b*) 1 Lev. 233. Cro. Car. 62. 202. Hob. 83. Post. Blackborough *v.* Davis 43, but more particularly see the case of Edwards *v.* Freeman, Vol. II. 441.

But that the point might be the more solemnly settled, the executors were ordered to declare upon a prohibition; and afterwards on debate a prohibition was granted.†

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Upon this, the daughter, as next of kin, brought a bill in Chancery (*c*) against the executors for an account of the surplus; and though there were proofs that the testator intended his executors should have the surplus; in regard that the daughter had incurred her father's displeasure by having married against his consent, yet these being somewhat doubtful, it was decreed first by Sir *John Trevor*, Master of the Rolls, and afterwards by Lord *Somers* upon an appeal, that the executors should be but trustees as to the surplus, after their legacies paid; and that such surplus should go according to the statute of distributions. And it was said by Lord *Somers*, that equity did delight in equality, and that the distribution according to the statute was most agreeable to natural justice.

(*c*) 20 May, 1696.

That it was dangerous to admit of parol proof where there was a will in writing; however, in relation to a personal estate (*d*), the court would allow of proofs and averments; but then such proofs ought to be plain and indisputable, to intitle an executor to the benefit of the surplus; and for this purpose the

(*d*) Vide 1 Vern. 31. Fane *v.* Fane. Et post. 114. lady dowager Granville *v.* duchess dowager of Beaufort, where such proof is admitted to rebut an equity.

† The prohibition was granted rightly; forasmuch as the spiritual court, by compelling a distribution, would, in effect, compel the execution of a trust, which they cannot do. See this reason given *per* lord Chancellor *Macclesfield*, in the case of *Farrington* v. *Knightley*, post. 547.

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(*a*) 2 Vern. 252. Et post. Vol. II. 210. duke of Rutland et al'. *v.* duchess of Rutland et al'. (1)

court cited Lady *Gainsborough*'s case (*a*,) where the late Lord *Gainsborough* owed debts by mortgage, and made the countess executrix, against whom the heir brought his bill, to subject the personal estate in the first place to pay off the mortgage; and it being proved to have been the intention of the testator, that his executrix should have his personal estate, *exempt from debts*, and that the lawyer who drew the will having been instructed to insert in the will a bequest of the personal estate to the wife, had replied, there would be no occasion for that, she being to have the personal estate of (*b*) *course* as executrix, it was decreed, that the wife should retain the personal estate, and that the heir should not, in that case, have aid thereof, towards paying off the mortgage, notwithstanding that by the rules of the court the same was liable to be so applied.

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(*b*) Post. Rawlins *v.* Powel, 290.

[MICHAELMAS VACATION, 1696.]

CASE 3.

TWAITES *and* SMITH.

A child of a residuary legatee no witness to prove a will relating to personal estate by the civil law, by which law only such will is determinable.

AN appeal was brought before the court of delegates, from a sentence given by Dr. *Watkinson*, chancellor of the archbishop of *York*, for the validity and probate of a will of a personal estate. The single matter in question was, that there were only three witnesses to the will, and two of those happened to be children of the residuary legatee.

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(1) *Et vide Littlebury* v. *Buckley*, 2 Vern. 677. *Batchelor* v. *Searle*, 2 Vern. 736. *Heron* v. *Newton* (cited) post. 2 vol. 160. *Rachfield* v. *Careless*, post. 2 vol. 158. *Brassbridge* v. *Woodroffe*, 2 Atk. 68. *Lake* v. *Lake*, 1 Wils. 313. & Amb. 126. Lord *Hardwicke*'s judgment in *Ulrich* v. *Litchfield*, 2 Atk. 373. Notwithstanding the authority of these several cases, Lord *Hardwicke*, in *Blinkhorne* v. *Feast*, 2 Vez. 28. expresses himself to have been very tender in admitting parol-evidence in cases of this kind. And *Lake* v. *Lake* is the only case (in print) which has been decided since that time on parol-evidence. (*z*)

(*z*) In *Clennell* v. *Lewthwaite*, 2 Ves. Jun. 465. 644. *Williams* v. *Jones*, 10 Ves. 77. *Walton* v. *Walton*, 14 Ves. 318, and *Lynn* v. *Beaver*, 1 Tur. 63, the executor substantiated his claim to the residue by evidence.

Wherefore it was insisted that those two children were not competent witnesses: forasmuch as by the civil law the child was not allowed to be a witness for his parent, and so was the express text thereof, as appears by the *Digest*, tit. *de Testibus;* and this was said not to be any of the solemnities or ceremonies of the civil law; for then it might not be binding here, no part thereof being obligatory, or necessary to be observed among us, but what is required by the law of nature and nations: but the reason of this prohibition of children from bearing witness in cases where their parents were concerned, proceeded from the affection and duty they owed to their parents, and so was *Albericus Gentilis* in his tract *De Testibus, qu.* 2. *fo.* 230.

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In answer to which, it was allowed to be true, that by the civil law children were incapacitated as above; but then the same was urged to be only one of the ceremonies of that law, and so not of force with us: just as a (*a*) woman was thereby prohibited to be a witness (*z*), whereas our law knew of no such prohibition. But admitting these children were exceptionable for that reason, yet here remained one witness altogether without exception, and by the civil law one good witness might supply the deficiency of another exceptionable witness. See *Farinacius de Testibus, q.* 62. *fo.* 199, whose words are, *Testis unius inhabilitas et defectus suppletur ex fide et habilitate alterius.*

(*a*) Women were not permitted to be present at the *Roman* assemblies, where formerly wills were made, and so could not be witnesses thereto. Wood's Inst. Civil Law, 17, 18.

And it being ordered by the civilians that precedents should be searched, for the appellant, the case of *Marwood* versus *Metcalf* was produced, where upon an appeal from the court of *York* to the delegates, this very exception was insisted upon and at length allowed. Also the case of Sir *Thomas Littleton*, where the like exception prevailed; but this last case not being before a court of delegates, there were no common law judges.

For the defendant was shewed the precedent of—— lately adjudged by a court of delegates, where Mr. Justice *Powell* jun. was in the commission, and present (and which, at the hearing of this principal case, he remembered); the point there was upon the revocation of a will; and whereas by the

(*z*) *i. e.* where the party had the power of choosing his witnesses, as in case of a will; but women were by the civil law allowed to be witnesses, where no others could be produced, Domat. Lib. 3. s. 3. pl. 4.

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statute (*a*) of frauds it is enacted, that no will shall be revoked, but where the writing revoking it is signed in the presence of three witnesses; it fell out that there were in that case three * witnesses, two whereof were unexceptionable, but the third, being the child of the residuary legatee, was, for that reason, objected to, as no witness by the civil law.

(*a*) 29 Car. 2. cap. 3. sect. 6. Et vide post. Onions *v.* Tyrer, 344.

[*12]

But it was decreed by the judges delegates, that there being two good witnesses, which were sufficient to prove the revocation by the civil law, though the statute required a third witness, yet that other witness added by the statute, needed not to be qualified according to the civil law: from whence the common lawyers inferred, that our judges have not looked on themselves as bound up by the rules of the civil law, but at liberty to follow their own, where the two laws differ.

To which it was replied, *first*, that this being a will of a personal estate only, was proper to be determined by the canon and civil (*b*) laws; and that the judges had, in all such cases conformed thereto (*c*); indeed, where some temporal matter depends on an ecclesiastical cause, and is necessary to be determined with it, there, though the ecclesiastical judges may try such temporal matter, yet they ought to do it by the rules of the common law, to which it properly belongs; else the common law judges would interpose by sending prohibitions; and that with this distinction were all the cases, wherein the temporal judges had differed from the civilians, to be reconciled.

(*b*) Post. 267. Anonymous, Mich. Term 1714. and Plume *v.* Beale, 388.

(*c*) Salk. 546. 4 Co. 29.

Secondly, That in this case, the having of one good witness would not help the disability in the rest; for that was to be understood, where the exception went only to diminish in part the credit of the witnesses, as on account of friendship, or even relation in a further degree, but not in case of exception to a child, who was absolutely prohibited to be any witness at all.

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Thirdly, That the exceptions to witnesses in the civil law, and in a cause triable by them, were not to be compared to such exceptions as might lie against witnesses at common law, where the trial was by jury, but rather to exceptions to the jury; and this of relation was a good cause of challenge to a jury-man (*d*) even at common law.

(*d*) 1 Inst. 157. a.

Lastly, (As the strongest argument in favor of the exception) the constant practice was appealed to; and that the defect could not be supplied by another intire witness, was said to appear from *Swinburne*, who giving an account of the prac-

tice and law here in that particular (lib. 4. sect. 24.), expressly says, when the law resists the examination of witnesses, it shall not be supplied by any other witness. Whereupon the common law judges agreed with the civilians, that these two children were not to be allowed as witnesses; therefore the will failed for want of proof, one witness being by the civil law as no witness (*a*,) and so administration was granted to *Twaites* the appellant. *Powel* sen. was a little doubtful, but thinking that in this case he was to be bound by the civilians, he at length agreed, and the sentence given at *York* was reversed. †

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(*a*) Post. Blackborough *v.* Davis, p. 47.

Afterwards a commission of review was sued out upon this sentence, but the parties agreed, and the executor renounced.

(†) *Quere*, If the will in question appeared to be written, or so much as subscribed, by the testator's own hand; since in either of these cases it would have been good without any witnesses at all. *Vide* Swinb. 300. (1)

(1) So, although only dictated by the testator as instructions for a will. *Cary* v. *Askew*. 2 Bro. C. C. 58. (*z*)

(*z*) S. C. 1 Cox, 241. Et vide *Matthews* v. *Warner*, 4 Ves. 186. 5 Ves. 23. *Habberfield* v. *Browning*, *Cobbold* v. *Baas*, cited 4 Ves. 200. *Scott* v. *Rhodes*, 1 Phil. 12. *Sandford* v. *Vaughan*, ib. 39. 128. *Green* v. *Skipworth*, ib. 53. *Wood* v. *Wood*, ib. 357. *Read* v. *Phillips*, 2 *Phil.* 122. *Huntingdon* v. *Huntingdon*, ib. 213.

DE TERM. S. HILLARII, 1700. *B. R.* [14]

11. Sim. 572.

FISHER *versus* WIGG.

CASE 4.

EJECTMENT: A copyholder in fee had issue four sons and two daughters, and surrendered his copyhold to the use of his wife for life, and after her death, to the use of his

Salk. 391. Ld. Raym. 622. Lilly's Entries 205. S. C. Com. Rep. 88. 12 Mod. 296. 3 Salk. 206. 1 Eq. C. Abr. 291. note (*a*). Surrender of a copyhold to the use of *A.*, *B.* and *C.* and their heirs equally to be divided betwixt them and their heirs respectively. This held by two judges a tenancy in common (2), by reason of the apparent intent of the surrenderor, against the opinion of *Holt* C. J. who thought it a jointenancy.

(2) In cases of wills, the words "equally to be divided" certainly make a tenancy in common; *Prince* v. *Heylin*. 1 Atk. 493. *Owen* v. *Owen*. 1 Atk. 494. *Heath* v. *Heath*, 2 Atk. 122. *Hawes* v. *Hawes*, 3 Atk. 525. *Stones* v. *Heurtly*, 1 Vez. 165. (*z*) So, in deeds which receive their opera-

(*z*) *Cooper* v. *Jones*, 3 B. & A. 425. *Davenport* v. *Hanbury*, 3 Ves. 259. *Morley* v. *Bird*, ib. 631. *Doe* v. *Elvey*, 4 East, 313. *Roe* v. *Bacon*, 4 M. & S. 366. Et vide *Reade* v. *Reade*, 5 Ves. 744. *Campbell* v. *Campbell*, 4 Bro. C. C. 15. *Casterton* v. *Sutherland*, 9 Ves. 445, where the words "unto and among" were held to have the same effect; and a similar decision as to the words "between them." *Lashbrook* v. *Cock*, 2 Mer. 70. See also *Doe* v. *Ironmonger*, 3 East, 533.

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three younger sons and two daughters, equally to be divided, and their respective heirs and assigns for ever.

The question was, whether these words made a tenancy in common; or whether the sons and daughters took as jointenants? And the matter having been argued solemnly at the bar, the judges now delivered their opinions *seriatim*.

Gould J. The sons and daughters take as tenants in common, and not as jointenants.

In construction of deeds this rule is to be observed, (*viz.*) to make all parts of them take effect, according to the intent
[15] of the parties, so as it be not contrary to the rules of law; and it will not be inconsistent with any rule of law, to construe this a tenancy in common; the words upon which we are to judge being, not words of limitation, nor creation of an estate, but of qualification and correction.

There are no precise words requisite to make a tenancy in common. Lit. sect. 292. 1 Inst. 189. a. Cro. Eliz. 695. 3 Co. 39. *Ratcliff*'s case. The words (equally to be divided) go to the quality of the estate, and not to the limitation of it; a joint estate in the premisses may be altered by the *habendum*. Hob. 172. 1 Inst. 190. b. Cro. Car. 75. A grant to a man and his heirs, but if he die *sans* issue, *&c.* this turns the fee in the premisses to an estate-tail, and corrects the generality of the preceding words. 19 H. 6. 74. The intention of the surrenderor was to make provision for his younger

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tion from the statute of Uses; *Rigden* v. *Vallier*. 2 Vez. 252, & 3 Atk. 731. *Goodtitle* v. *Stokes*, 1 Wils. 341. *Secus* in common law conveyances; *Stones* v. *Heurtley*, 1 Vez. 165. *Rigden* v. *Vallier*, 2 Vez. 257. where Lord *Hardwicke* says, that although deeds to uses must be construed like common law conveyances, as to *words of limitation*, yet he saw no harm in construing them otherwise, as to words of *regulation or modification of the estate;* as the words "equally to be divided" are. Vide *Stratton* v. *Best*. 2 Bro. C. C. 233. The present case of *Fisher* v. *Wigg*, is determined on the principle that a surrender of a copyhold is not to be construed with the same strictness as a common law conveyance (as said by Lord *Hardwicke*, 2 Vez. 257.) which contradicts the ground of determination in *Idle* v. *Cook*, post. 70. (where it is said that the construction of a surrender must be the same as if the estate had been limited by *feoffment*, and must be governed alike by the rules of the common law), unless the two cases be reconciled upon Lord *Hardwicke*'s distinction between words of *limitation*, and words of *regulation*, &c. However, in cases of surrenders of copyholds, this case seems an acknowledged authority; *Rigden* v. *Vallier*. ub. sup. *Goodtitle* v. *Stokes*, 1 Wils. 341. *et Denn* v. *Gaskin*. Cowp. 660. (*y*)

(*y*) But see the observations on this case, 1 Watk. on Copyh. 110. and see Gilb. on Uses, by Sugden, 143. n. 1. 2 Fonb. Eq. 51.

children and their heirs, which will not take effect, if it be a joint estate. Surrenders of copyhold land to uses shall have the same favourable construction as wills, and are not to be tied up to the strict rules of the common law, but expounded according to the intention of the party. 2 Bulst. 274. 3 Cro. 323. Poph. 125, 126. Plowd. 151. 1 Saund. 151. 2 Vent. 365. (1) And though there has been a running notion passing *obiter* in some books, that there is a diversity betwixt wills and conveyances in common law, yet that matter has not been scanned or settled: for, as to the intention of the party, the words in a deed are capable of the same construction as in a will. As to the case in 2 Roll. Abr. 90. 5. *Furse* versus *Weeks*, the diversity there is upon a conveyance at common law, but here the case is upon a limitation of an use. In the case of (*a*) *Blisset* versus *Cranwell*, Paschæ 6 W. & M. C. B. a devise was to two and their heirs, and the longer liver of them, equally to be divided, after the death of the testator's wife; and resolved, this was a tenancy in common. The words *equally divided*, or *equally to be divided*, make a tenancy in common in a will, beyond all dispute, and we are here in the case of an use, which bears the like construction with a will. (2)

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(*a*) Salk. 226.

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In 2 Roll. Abr. 67. *Brooks* versus *Brooks*, the wife was named after the *habendum* in the surrender of a copyhold, and yet took an estate according to the limitation, upon that rule of construction. Paschæ 32 Car. 2. B. R. *Smith* versus *Johnson*. A feoffment was made to two and their heirs, equally to be divided, and there *Scrogs* and *Dolben* were of opinion that the feoffees were tenants in common, and not jointenants; but *Jones* differed.

Turton J. was of the same opinion, (*viz.*) that it was a tenancy in common, and argued much to the same effect, only he added, that a *præcipe* lies of two acres *in tres partes dividend'*, which is a tenancy in common, 13 Co. 58. 21 Ed. 4. 22. That if this limitation had been before the statute of uses, the chancery would have compelled a conveyance to the sons and daughters in common, and the law shall have the same operation since: that if in this case, the father had surrendered the land to the use of his last will, and by his will had devised it in these words, it must have been agreed to create an estate in common; and there was no reason why

(1) In *Rigden* v. *Vallier*, 2 Vez. 256. to be found in the Register's book to warrant this report. Lord *Hardwicke* says, that no decree is

(2) Gilb. Dev. 143.

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a different construction should be put upon the words, when expressed in the surrender itself.

(*a*) 4 Co. 29. b. also post. Idle *v.* Cook 75.

Holt C. J. *contra :* Copyhold lands do not differ (*a*) in construction of law from freehold lands, and surrenders of copyholds must be governed by the same rules as conveyances at common law. The opinion in Poph. 126. which my brothers

[17] rely on, (*viz.*) that a surrender is to be construed as a will, is of no authority ; for it is amongst the additional cases, and not reported by *Popham ;* and there is no mention made of it in the report of the same case in Cro. Jac. 434.

If a copyholder surrenders to the lord, without declaring an use, the copyhold extinguishes, as on a surrender by tenant for life, to him in reversion.

The resolution in 2 Roll. Abr. 67. *Brooks* versus *Brooks,* was founded upon the custom of the manor, which was, that a person named after the *habendum* should take the estate limited to him ; so where a surrender is to several by custom, they shall take in succession as they are named : we are not upon the construction of an use, for a surrender to an use is a limitation of the estate, a declaration and direction to the lord how to grant the lands, and the surrenderor himself continues seised till the admittance of the surrenderee, and the person to whose use the surrender is made is not *cestui que use* in the mean time, but when admitted, he is in by grant from the lord.

By this surrender the sons and daughters are jointenants, and not tenants in common : for the words, equally to be divided, signify no more than the law would have implied without them, and therefore they can have no operation. 1 Inst. 186. a. One jointenant can only forfeit or dispose of his own part ; and if both join in a feoffment, and one die, it must be pleaded as the feoffment of both, and not of the survivor only.

The true difference between jointenants and tenants in common is put in Litt. sect. 292. 1 Inst. 188. b. jointenants hold by one joint title, but tenants in common by several titles. In our case the title is joint, and all claim under the same con-

[18] veyance ; the word (equally) doth not alter the manner of taking the profits, there being no difference, in that respect, between jointenants and tenants in common, in regard if one jointenant, or one tenant in common, take the whole profits, his companion has no remedy against him.

So jointenants have as separate an interest in the lands as tenants in common ; for tenants in common were no more

compellable at common law to make partition, than jointenants; and therefore in suing a writ of partition, the party never shews whether he is tenant in common or jointenant, but only that he is seised *pro indiviso*. Co. Ent. 413, 414. In like manner, one jointenant may dispose of his own part, as well as a tenant in common, and each has an equal proportion without those words, "equally to be divided"; neither does the word "respectively" (*z*) make any alteration of the estate for as much as there is no diversity betwixt a grant to two and their heirs, and a grant to two and their respective heirs, or to two and their heirs respectively, since the limitation must be to both their heirs, or they cannot both take a fee-simple, and if the fee enures to both their heirs, it must be to both their heirs respectively (which *Turton* and *Gould* agreed); and in construction of deeds, superfluous words are to be rejected, as having no operation. 8 Co. 145. a.

But there has been an objection drawn from Litt. sect. 298. If lands be given to two, *habend'* the one moiety to one, *&c.* they are tenants in common.

Resp. If a feoffment be made to two, *habend'* one moiety to one, and the other moiety to the other, this operates as several conveyances, and not as one, for there must be two liveries, because there are several freeholds, and livery to one, *secundum formam chartæ*, would not enure to the other; and that case is not like to ours, in regard there is an actual division and distribution of the land; whereas the words, equally to be divided, do not assign several parts. [19]

If a feoffment be made of twenty acres to two, *habend'* ten acres to one, and ten acres to the other, this *habend'* would be void, because repugnant to and inconsistent with the premisses, by which the whole twenty acres were expressly granted to both; otherwise where a manor is granted to two in the premisses, *habend'* one moiety to the one, and the other moiety to the other; these words (*y*) cannot make a tenancy in common, it being the nature of that estate for the tenants to be seised *pro indiviso*, but pursuant to this, they must hold *pro diviso*, which is so far from implying a tenancy in common, that it directly excludes it.

But it is objected, that in 1 Inst. 190. b. in *tres partes dividend'* implies a tenancy in common.

(*z*) See *Comber* v. *Hill*, 2 Stra. 970, *Davenport* v. *Oldis*, 1 Atk. 579.

(*y*) *i. e.* the words of the surrender.

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Resp. That is not mentioned in the case of 21 Ed. 4. 22. b. neither is *Coke* positive therein, it is only his conjecture.

Object. Jointenants have but one freehold; but tenants in common have several freeholds.

Resp. I agree it; but their parts in the land are not divided and several.

Object. These words in a will make a tenancy in common.

[20] *Resp.* There is a difference betwixt wills and conveyances at law; and words in the one shall have a different construction from what they would have in the other. (*z*) A grant to a man and his assigns for ever, in a deed passes only an estate for life; but the same words in a will give a fee-simple. 27 H. 8. 27. So an estate may pass in a will by implication, but not in a deed; the reason of which different construction is, because the law considers the circumstances of the testator, who is *inops concilii*, and will not hold him strictly to rules; and this reason took place in the construction of wills made by custom before the statute of H. 8. as in 11 H. 6. 12. the case of a devise to an infant *in ventre sa mere;* which same reason and rule of construction holds in wills made since the statute.

But precedents on wills will not influence this case; the *reason* of every case is the *strength* of the case; the reason of the opinion in *Ratcliff*'s case, 3 Co. 39. b. is not on the force of the words *equally to be divided*, but from the intention.

An estate in a will may be restrained and qualified by the intention of the testator, without express words. 13 H. 7. 17. Hob. 34. Cro. Car. 367. 1 Jo. 342. Where it is agreed, that the like limitation, had it been in a will, would have created an estate-tail, though it did not in a conveyance at common law, or in a surrender.

2 Rol. Abr. 90. A devise was to two equally to be divided, *habend'* to them and the survivor, and the heirs of the survivor; and resolved, they were jointenants and not tenants in common, because of the subsequent words which

[21] were not repugnant to the first. For the first words did not make a tenancy in common by express limitation, but by implication or (*a*) construction; which is the true reason of the case, and a full authority for me. If the limitation had been (*b*) express, the subsequent words would have been void and repugnant. Stiles 211, 434. Dyer 25.

(*a*) See post. 37. Phillips *v.* Phillips.

(*b*) See post. 55. Bamfield *v.* Popham.

(*z*) See *Wright* v *Kemp*, 3 T. R. 473, *Doe* v. *Morgan*, ib. 765.

It was after some time and debate that these words obtained to make a tenancy in common in a will; and the doubt proceeded from hence, (*scil.*) because they did not make an estate or tenancy in common at common law; for if they had, there could then have been no doubt upon a will. It has been hitherto the constant opinion, both at the bar and on the bench, that these words will not make a tenancy in common in a deed. Jointenancy is favoured in law, because, as the law does not love fractions of estates, so neither does it encourage division of tenures, or multiplication of services.

Now as long as the jointenancy continues, there is a joint tenure, but when the tenancy becomes in common, then the tenures and services are several. 6 Co. 1, 2. And by such constructions as my brothers make in the present case, instead of one copyhold estate, and one fine and single service, there would be five several copyholds and as many fines and services; and one tenant in common cannot have contribution for such against his companion, as a jointenant may. This is the true and only reason why joint estates are favoured in law; at least, I can invent no other.

But the case of *Smith* and *Johnson* is objected.

Resp. When that judgment was given, nobody was satisfied with it; and afterwards the rule for judgment was discharged, and an *ulterius concil'* awarded, and then the party died; so no judgment was given. There is no authority in the books against my opinion; on the contrary, the concurrent authorities of all times in *Westminster Hall* are for me; so that I think judgment ought to be given for the *defendant*. But my brothers make the majority, and therefore the *Plaintiff* must have judgment.

[22]

Bea. 329.

CASE 5.

NOTTINGHAM *versus* JENNINGS.

Salk. 233. Lord Ray. 568. Com. Rep. 82. 2 Eq. Ca. Ab. 308. pl. 10. A devise by a father to a second son and his heirs for ever, and for want of such heirs then to the right heirs of the testator, is an estate tail. But had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void. (1)

IN ejectment, on the trial, this case was made: *J. S.* had three sons, *A. B.* and *C.* and devised his lands to *B.* (his second son) after the death of his mother, to hold to him and his heirs for ever; and for want of such heirs, then to his (the testator's) right heirs.

The testator died, after which *B.* entered and died without issue, living *A.* who was lessor of the plaintiff.

It was argued by *Northey* for the plaintiff, that the estate devised to *B.* was but an estate-tail, and not a fee-simple; and that the word (*heirs*) should be construed *heirs of his body*; for that it must be intended, the testator took notice that his second son *B.* could not by any possibility die without heir, so long as his father had any other issue, who would be heir to him; that this construction was founded upon the same reason, as where a devise is to one and his heirs, and if he die

[24] without issue of his body, then to another, which is construed to be an estate-tail; because the testator appears to have intended only the heirs of the *body* of the first devisee. Cro. Jac. 415. (*a*). *Webb* versus *Herring*. 1 Rol. Rep. 398, 436. Cro. Jac. 428. 448. 1 Rol. Abr. 836. 3 Keb. 589.

(*a*) Vide also the case of Parker *v.* Thacker, 3 Lev. 71.

Carthew for the defendant insisted, that *B.* took a fee-simple and relied on the case of *Hearne* versus *Allen*, Cro. Car. 58. That this case differed from that of *Webb* versus *Herring*, forasmuch as here was an express devise of a fee-simple, but there

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(1) So *Allen* v. *Spendlove*, 2 Eq. Ca. Abr. 305. pl. 2. *Tyte* v. *Willis*, Ca. temp. Tal. 1. *Tilburgh* v. *Barbut*, 1 Vez. 89. *Goodright* v. *Dunham*, Doug. 264. *Pickering* v. *Towers*, Amb. 363. (*z*) *Ives* v. *Legge*, 3 T. R. 488. (note). *Doe* v. *Perryn*, 3 T. R. 491. (*y*)

(*z*) S.C. 1 Eden, 142.

(*y*) *Morgan* v. *Griffiths*, Cowp. 234. *Doe* v. *Welton*, 2 B. & P. 327. *Doe* v. *Bluck*, 2 Marsh. 170. 6 Taunt. 485. Et vide *Philips* v. *Philips*, post. 38, 9.

the son took only by implication; and therefore the implied estate was made to give way to that which was expressed; which diversity was the foundation of that judgment. That it must be agreed, if this remainder had been limited to a stranger, it had been void, and *B.* would have taken a fee-simple. 9 H. 8. 8. b. Cro. Jac. 416. Yelv. 209. That this devise over to the testator's right heirs was intirely void; for the eldest son should not take by purchase by the words of the will, but would be in by descent; for which reason, this clause being a nullity, and passing no estate, it ought not to assist the construction of the will, by making an estate-tail by implication; that the devise over being *generally* to his (the testator's) right heirs, and no particular person in view, and there being an express devise of a fee-simple, and no express remainder, *B.* ought to take a fee-simple, and no implication to be made of an estate-tail.

But the whole court adjudged it to be but an *estate-tail* in *B.* And by *Holt* C. J. though the eldest son shall not take by this will, but shall be in by descent, and so the devise over void in point of limitation, yet it is sufficient to manifest the intent (*z*) [25] of the testator, and aid the construction of an estate-tail. It appears to have been the testator's intent, that the lands should descend from himself, (*y*) and not from his son *B.* that the reversion should go to his own right heirs; and since that clause discovers his intent, it is not material whether the devise over be good or not. I agree, if the devise over had been to a stranger, it had been void, and *B.* had taken a fee-simple; but, in the present case, the word (*heirs*) can import nothing more than issue; for how could he possibly die without heir, living the other brother? So that the word (*heirs*) must be qualified; as suppose in this case the lands had been devised to *B.* and his heirs, and if *B.* die without issue, then to another, this, without all doubt, would have been an estate-tail; (*x*) the case of *Webb* versus *Herring* is a strong case, upon the authority of which I should have made no difficulty of adjudging it an (*a*) estate-tail at my chambers.

Judgment for the plaintiff.

(*a*) Vide post. Vol. II. 369. the case of the Attorney General *v.* Gill.

(*z*) See Vol. III. 367. n. A.

(*y*) See *Kellow* v. *Rowden*, 1 Show. 244.

(*x*) Acc. *Brice* v. *Smith*, Willes, 3. *Doe* v. *Rivers*, 7 T. R. 276. *Doe* v. *Whichelo*, 8 T. R. 211. *Doe* v. *Ellis*, 9 East, 382. *Tenny* v. *Agar*, 12 East, 253. *Dansey* v. *Griffiths*, 4 M. & S. 61.

CASE 6.

PETT'S CASE.

Salk. 250. Intestate dies leaving a deceased brother's child and a deceased brother's grandchild, the grandchild not admitted to any distributory share; the clause in the statute which says, that there shall be no representatives among collaterals beyond brothers' and sisters' children, being to be intended that none shall take by representation but the children of brothers and sisters to the intestate.

A MOTION was made by Mr. *Lechmere*, for a *mandamus* to the judge of the spiritual court, to make distribution on the statute of 22 & 23 Car. 2. cap. 10. And the case being ordered to be put in the paper to be argued, appeared to be thus:

[26] Sir *Peter Pett*, in *April* 1699, died intestate, having neither wife nor child; his next of kin was *Elizabeth*, daughter of Sir *Phineas Pett*, who was brother to the said Sir *Peter Pett*, and administration was committed to this *Elizabeth Pett*.

The persons claiming distribution were *Margaret* and *Peter Pett*, children of *Peter Pett*, who was son of Sir *Phineas*, and brother of *Elizabeth* the administratrix,

And the question was, whether the intestate's brother's son's children, being the grand nephew and grand niece of the intestate, should come in for a distributive share with the intestate's niece? the statute saying, that the personal estate, in case there shall be no wife or child, shall go to the next of kin of the intestate, and their legal representatives; after which comes a proviso, enacting, that there shall be no representation among collaterals after brothers' and sisters' children.

In support of the motion, Mr. *Lechmere* contended, that the design of this act was to be diffusive, and to apportion, as much as possible, the intestate's personal estate, so that all the near relations might be provided for; and that, for this reason, it was properly called a statute of *distribution*; which title could no way be answered, were any one single hand allowed to sweep away the whole; besides that this had been hitherto the practice in the spiritual court.

Against which, on behalf of the administratrix, it was urged by Mr. *Harcourt*, that the grand nephew and grand niece, if intitled to any distributive share, must claim it, either as next of kin in equal degree, or else, as representatives.

[27] And first, as next of kin, there was no colour for it; for they could not be in equal degree of kin because the administratrix was the brother's daughter, and *Margaret* and *Peter* the brother's grand children, (that is) one degree further.

2*dly*, As representatives, they could not be intitled; for as much as they were not children of the brother of the intestate; that it was reasonable to construe this statute as favourably as might be for the administrators, since a great burden lay upon them at law, in duly administering the intestate's estate; and this statute of Car. 2. took away from their profit, but did not at the same time (as it ought to have done) lessen their burden. He cited Raym. 496. *Carter* versus *Crawley*, C. J. *North*'s opinion; and said, that it had been so settled in chancery in the cases of *Clement* and *Harris* 1680. (*a*) *Maw* versus *Harding*, 20 *July* 1691. and *Newcomb* versus *Tucker*, 16 *Feb.* 1694. PLTT'S CASE.

(*a*) 2 Vern. 233. Pre. Cha. 28.

That it was true, among lineals, representatives *ad infinitum* should share in the distribution, otherwise among collaterals.

Holt C. J. Sir *Walter Walker*, a famous civilian, drew this (*b*) act for distribution; and the only question now before us upon it is, whether the words *brothers' and sisters' children* in the proviso, shall not be intended brothers' and sisters' children of the *intestate?* Now surely they ought to be so taken; for the intestate is the subject matter of this act; it is his estate, his wife, his next of kin, his children, and consequently his brother's children, that the * statute speaks of; so that the relative terms made use of throughout, have the intestate for their correlative. The intent of the proviso was to confine the degrees of representation, that they should not go beyond brothers' and sisters' children. And if this construction has not hitherto prevailed in the spiritual court, the parties are at liberty to appeal.

(*b*) And except in some few instances mentioned therein, this statute is to be governed and construed by the rules of the civil law. Per the master of the Rolls (Sir Joseph Jekyll), in the case of Mentney versus Petty. Pre. Cha. 593. [*28]

Et per Gould J. It has been always said, the statute shall not be taken in favour of distributions.

Wherefore the *mandamus* was denied; the whole court declaring, that among collaterals, saving only in the case of brothers' and sisters' children, proximity of blood should give title to the personal estate of the intestate.

See 2 Vern. 168. Beeton versus Darking & e cont'; but more particularly the case of Bowers versus Littlewood, post. 594. where lord chancellor Macclesfield declares the law to be settled by the resolution above mentioned.

CASE 7.

COX'S CASE.

LORD KEEPER WRIGHT.

Salk. 672. the same point argued, but no resolution. The spiritual court has jurisdiction of grammar schools, but in case of a libel for teaching school generally, without saying what school, the temporal courts will grant a prohibition. (*y*)

COX was libelled against in the spiritual court at *Exeter*, for teaching school without (*z*) licence from the bishop; and on the 14 of *December* last, on my motion before the then lord chancellor, an order was made, that cause should be shewn on the first day of the term then next following, why a prohibition should not go, and that in the mean time all things should stay; which order had been from time to time inlarged to this day.

And now the *Attorney General* and Dr. *Waller* moved to discharge the said order, alledging, that before the reformation, this was certainly of ecclesiastical jurisdiction, and in proof of it they cited the 11th canon, of the council of (*a*) *Lateran*, held *anno* 1215, which canon (as well as that for making tithes parochial) has been received by custom into this kingdom, and so made part of our ecclesiastical laws.

(*a*) Decree 6. title 5. cap. 1, 2, 3.

That the 1st of Eliz. cap. 1. having restored the spiritual jurisdiction to the crown, which had been usurped by the pope, immediately thereupon the queen set forth (*b*) ecclesiastical injunctions, the 40th whereof is, that no man shall take upon himself to teach school, but such as is allowed by the ordinary; the making of which injunctions by the ecclesiastical power of the crown, shews them to be of an ecclesiastical nature, and consequently cognisable in the spiritual court.

[30]

(*b*) See Sparrow's Collections, 305.

That it must be admitted, these injunctions were not confirmed by any act of parliament, but their being referred to, and mentioned in 5 Eliz. cap. 1. was an argument that the legislature did approve of them; that in the 12th year of that queen, the said injunctions (and among them, this against teaching school without a licence from the ordinary) were, by the convocation then sitting, turned into canons; that afterwards the 23d of Eliz. cap. 1. was the first statute that pro-

(*z*) See St. 19 G. 3. c. 44. s. 2. 2 Stra. 1023. *Rex* v. *Abp. of York*,
(*y*) Vide *Rex* v. *Bp. of Lichfield*, 6 T. R. 490.

Cox's Case.

hibited it, since which two (*a*) others had followed; but none of them tended to destroy the ecclesiastical jurisdiction, only, by making the offence punishable in both courts, gave a remedy where there was none before; that in the 1 Jac. 1. the convocation met, which reduced all the canons into one body, and then particularly made this canon, that none should teach school without licence from the ordinary; and though it might be difficult to prove, that these canons were directly confirmed by act of parliament, yet there was a sort of confirmation of them in 4 Jac. 1. cap. 7. for the founding and incorporating a free grammar school at *North-Leech* in the county of *Gloucester*, whereby the provost and scholars of *Queen's College* in *Oxford* were to nominate the school-master and usher of the said school, and to make such ordinances for the government thereof as they should deem meet, so that the same were not repugnant to the king's prerogative, to the laws and statutes of the realm, or to any *ecclesiastical canons, or constitutions of the* church *of England.*

(*a*) 1 Jac. 1. cap. 4. 13 & 14 Car. 2. c. 4.

[31]

But on the other side it was answered, that there could not be one canon or precedent before the reformation, cited to prove the keeping of school to be of ecclesiastical cognisance; for that supposing the council of *Lateran* to have been in every part thereof received in *England*, yet the canon cited did not prove the point for which it had been produced, that canon only appointing school-masters in *every cathedral church*, and such schoolmasters to be licensed by the bishop; which was but reasonable, (*viz.*) that he who taught in the bishop's church should be approved of by the bishop; that the teaching of school was not in the nature thereof spiritual; and it would be hard to affirm that it was of ecclesiastical jurisdiction, or cognisable by the old ecclesiastical laws of the kingdom received by common use, at the same time that not one single precedent of any such law or usage before the reformation was to be found. And that as to the canons made since, they did not bind a lay-man (as *Cox* was suggested to be) because the laity was not represented in convocation; and it was a fundamental maxim of our government, that what bound all must be assented to by all; neither could a reference to the canons in a private act of parliament add any greater weight to them than they had before.

That this was a case which deserved great consideration, having before been in the other courts of *Westminster-hall*, where several prohibitions had been granted on this very same point, in order that it might receive a judicial determination,

[32]

Cox's Case. but the other side would never venture to go on; as in the case of † *Belcham* versus *Barnardiston* in *C. B.* and in *B. R. Oldfield*'s case, *Mich.* 9 *W.* 3. *Chedwich*'s case, *Mich.* 10 *W.* 3. (*a*) Salk. 105. *Scorrier*'s case, *Trin.* 11 *W.* 3. and 12 *W.* 3. one *Davison*'s (*a*) case, who being brought to the bar on a *habeas corpus*, it appeared thereon that he was committed on an *excommunicato capiendo*, being excommunicated for teaching school without licence; and the court holding it to be a doubtful point, bailed him during their consideration thereof; which practice of the other courts in *Westminster-hall*, shewed it to be a matter not fit to be determined on a motion, but in a judicial way. But supposing it to have been originally a spiritual crime, yet, being now made a temporal one by several acts of parliament, it was thereby drawn from the spiritual to the temporal jurisdiction.

Lord Keeper: Both courts may have a concurrent jurisdiction; and a crime may be punishable both in the one and the other. The canons of a convocation do not bind the laity without an act of parliament: (*z*) but I always was, and still am of opinion, that keeping of school is by the old laws of *England* of ecclesiastical cognisance, and therefore let the order for a prohibition be discharged.

Whereupon I moved, that this libel was for teaching school *generally*, without shewing what school; and court christian could not have jurisdiction of writing schools, reading schools, (*y*) dancing schools, &c.

[33] To which the Lord Keeper assented, and thereupon granted a prohibition as to the teaching of all schools, excepting grammar schools, which he thought to be of ecclesiastical cognisance.

† *Pasch. & Hill.* 10 & 11 *W.* 3. where the chief question was, Whether a schoolmaster might be prosecuted in the ecclesiastical court for not bringing his scholars to church, contrary to the 79th canon in 1603? And it was the opinion of *Treby* C. J. and *Powel* J. and the court, that the schoolmaster being a layman was not bound by the canons.

(*z*) Vide *Middleton* v. *Crofts*, 2 Atk. 650. 2 Str. 1056. *Rex* v. Abp. of *York*, 6 T. R. 490.

(*y*) *Rex* v. *Douse*, 1 Ld. Ray. 672, and see *Rex* v. *Morpeth*, 1 Str. 58.

PHILIPS *versus* PHILIPS.

CASE 8.

THIS was a case sent out of chancery to the justices of *C. B.* for their opinion. *William Philips* had a wife named *Elizabeth* and one only daughter named *Martha*, and being seised in fee of divers lands in the counties of *Flint* and *Denbigh*, devised his lands to trustees and their heirs, in trust, that the profits thereof should be equally divided betwixt his wife and his daughter, during the life of the wife, and after her decease, he devised the lands to the trustees and their heirs to the use of his daughter *Martha* and the heirs of her body for ever, with divers remainders over, one of which (as to part of the lands) was to the plaintiff, the now heir at law of the testator.

2 Vern. 430. Precedents in Chan. 167. 1 Eq. Ca. Ab. 292. pl. 6. 2 Free. 11, 12. 247. *A.* by will devises lands to trustees and their heirs, in trust, that the profits should be equally divided between his wife and daughter (the heir of the testator) during the wife's life, and after her death he devises the same to the use of his daughter in tail, with remainder over; the daughter dies without issue, and intestate, during the mother's life: resolved by the opinion of all the judges of *C. B.* that the mother and daughter were tenants in common, and that the mother should have a moiety of the profits during her life, and that the other moiety, by the statute of frauds and perjuries, should go to the executors or administrators of the daughter, as before that statute it would have been liable to occupancy, and not to the heir of the testator, as profits undisposed of and resulting to him. (*z*)

The testator died, after which *Martha* the daughter died without issue, and intestate, in the life of the wife, who took out administration to her daughter: and the question was, betwixt the plaintiff the testator's heir at law, and the defendant the wife, whether the daughter's moiety of the premisses should descend or result to the testator's heir at law, or whether the testator's wife should have the whole for her life?

[35]

And I argued on behalf of the wife as follows:

I will admit that this, being a devise of a trust, shall have the same (*a*) operation and construction as if it were of a legal estate; and that nothing in this case can make a question, but the words [equally divided]; for if they were out, then the case would be, I devise the profits of my lands to my wife and daughter during the life of my wife, which would plainly make them jointenants, and the wife surviving would have the whole for her life: so that,

(*a*) Vide post. 109. Watts *v.* Ball.

First, it is to be considered, whether the words [equally to be divided] will in this case make a tenancy in common? (1)

(1) Vide the case of *Fisher* v. *Wigg*, *ante*, p. 14. and the authorities there mentioned.

(*z*) *Turkerman* v. *Jeoffrys*, Holt, 370.

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Secondly, admitting they do make a tenancy in common, whether there be not a subsequent devise to the wife for her life by implication? the words being, *after the decease of my wife,* I devise the lands to my daughter (who was heir at law) and the heirs of her body.

Thirdly, admitting both these points to be against me, (*viz.*) that it is a tenancy in common, and that the wife has no devise to her for her life by implication, whether this estate does not
[36] go to the daughter's executors or administrators, and not to the heir at law of the testator? in which case it will belong to the wife, who hath a right to administer to the daughter.

As to the first, I take it, that the words [equally divided, or to be divided] will not make a tenancy in common in this case.

I admit these words, in case of a devise of the *inheritance,* or of a *lease for years,* will make a tenancy in common; but where the devise is for *life* (which is our case), the law is otherwise.

In case of a devise of an *inheritance,* where lands are given to two and their heirs equally, the reason why it is a tenancy in common is, for that it appears to be the intent of the testator, that each of the devisees' heirs should have an equal share in the inheritance; which could not be, if they (the ancestors) were jointenants; for then, if one were to die, the heir of him dying first should have nothing, and the survivor would be intitled to the whole estate, as from the donor.

But in case of a devise to two for their *lives* equally, it can be of no advantage to the devisees to have it construed a tenancy in common; for if one dies, supposing it to be a tenancy in common, the estate, as to a moiety, determines, and the remainder-man or reversioner shall enter; wherefore it cannot be any loss to the devisees to construe it a jointenancy, and to carry such moiety to the survivor of them. This, I say, is no prejudice to the devisee that dies first; and agreeable hereto
(*b*) Cro. Eliz. 696. Lewen *v.* Cox. was the (*a*) opinion of the lord C. J. *Popham,* which I do not remember to have seen impeached in any book: and it is
[37] exactly our case, as to this point; for there can be no difference betwixt a devise to two for their lives, and a devise to two for the life of one of them, in regard that though in the last case there is not an equal advantage of survivorship, yet according to 1 Inst. 181. b. it is a good jointenancy.

And this opinion of C. J. *Popham,* holding that the words [equally divided] do not make a tenancy in common, in case of a devise for *life,* as they will where the devise is of an *inheri-*

tance, seems to have the more reasonable foundation, for that the words [equally divided] according to 2 Roll. Abr. 90. (*Furse* versus *Weeks*) make a tenancy in common by (*a*) construction only, and collection of the intent of the testator.

(*a*) Ante, 21. Fisher *v.* Wigg, Salk. 227, 392. 2 Vern. 323.

That case was, a man seised in fee had two daughters and a son, and devised his land to his two daughters, equally to be divided between them, and the survivor of them, and the heirs of the body of the survivor, upon which devise the two daughters were adjudged to be jointenants, and not tenants in common, notwithstanding the words [equally to be divided]; for, says the book, in a deed or grant, the words [equally to be divided] will not make a tenancy in common; and in a will they only make a tenancy in common by construction; for if other words in the will shew it to have been the intent of the testator, that it should rather be a jointenancy, than a tenancy in common, it shall be so; and in this case the *habendum* being to the survivor of them, and the heirs of her body, was a strong evidence that the testator intended a jointenancy, without which the survivor could not take it; so that here it was adjudged a jointenancy, and not a tenancy in common, notwithstanding the words, equally to be divided.

Now the intent in the principal case seems to have been chiefly to provide for the *wife*: It is the wife's life only that the will expressly mentions. [38]

I admit, by the will the profits are to be divided, during the mother's life, between the mother and daughter; but when the daughter is dead (so that there can be no longer a division of the profits between them), then the mother (the testator's wife) shall have the whole; but if the intent be not so plainly expressed, as I contend it is, yet it being a devise of the premisses for *life* only, I adhere to the lord *Popham's* opinion, that the words [equally to be divided] will not, in such case, make a tenancy in common.

As to the second point, that seems very plain for me.

The devise is of the profits to the testator's wife and daughter during the life of the wife, and after the decease of the wife, then to the use of the daughter and the heirs of her body, with remainder over.

Now by virtue of these words, I devise, after the decease of my wife, to my daughter and the heirs of her body, the daughter *being heir* at law, this is a devise by implication to my wife for her life.

I agree, a devise to one who is *not* my heir at law, after the death of my wife, is no devise by implication to my wife; for

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in that case it shall descend to the heir at law in the mean time; but where the devise is to the *heir* at law, after the death of the wife, this is a plain and necessary implication, that the wife shall have it for her life; for no other person can take it, the heir being expressly excluded until the death of the wife; this is the (*a*) known case of 13 H. 7. 13. Bro. Devise 52. Cro. Jac. 75. *Horton* versus *Horton*. Vaugh. 263. *Gardiner* versus *Sheldon*.

[39]

(*a*) Post. 473. Willis v. Lucas. (1)

In Cro. Eliz. 15. *Higham* versus *Baker*, there is a much stronger case adjudged: and that was, one seized in fee of a messuage and lands thereto belonging, called *Mascals* devised this messuage, &c. to his wife *Alice*, and his *younger son Robert*, for payment of debts and legacies, and after the death of the wife, the remainder to *Robert in fee*; the debts and legacies were paid: and upon this it was resolved, the wife should have an estate for life by implication; which differs from our case only in being stronger; for there the devise after the death of the wife was not to the *heir*, but to a *younger son*, and yet it was adjudged to operate as a devise to the wife for her life; so that it seems to be pretty clear, in the principal case, that the wife has an estate for life by implication. But,

Thirdly, admitting it to be a tenancy in common; admitting it likewise to be no devise by implication to the wife, yet the executors or administrators of the daughter, and not the heir at law of the testator, will have title.

For then, supposing it to be a tenancy in common, the case would be but thus: I devise my lands to my wife, and my daughter for the life of my wife, to hold by moieties, and the daughter dies during the life of the wife, Q. what shall become of her moiety?

If this were all the case, such moiety must go to the daughter's executors or administrators during the life of the wife; for the daughter is plainly tenant *pur auter vie*, as to her moiety, and as the remainder-man or reversioner can claim nothing till after the death of the wife, then this estate *pur auter vie* in the daughter's moiety must go to the occupant,

[40]

(1) So in *Hutton* v. *Simpson*, 2 Vern. 723, and S. C. Pre. Cha. 439, by the name of *Simpson* v. *Hornsby*. A devise to *A*. after the death of *B*. although *A*. be but one of two co-heirs, will give *B*. an estate for life by implication. (*z*)

(*z*) S. C. Gilb. Rep. Eq. 115. Et vide *Dyer* v. *Dyer*, 1 Mer. 414. *Doe* v. *Bowling*, 5 B. & A. 722. *Aspinall* v. *Petvin*, 1 S. & S. 544. *Dashwood* v. *Peyton*, 18 Ves. 40.

which the (*a*) statute of frauds appoints to be the executor or administrator; and in the present case the mother is administratrix.

(*a*) 29 Car. 2. cap. 3. sect. 12.

If I devise lands to *A.* for the life of *B.* on *A.*'s death, they must go to *A.*'s executors during the life of *B.* So if I devise lands to *A.* and *B.* for the life of *B.* to hold by moieties, if *A.* dies, his moiety shall go to his executors or administrators during the life of *B.* and the mother in this case is the administratrix or occupant, and consequently it belongs to her.

Wherefore upon the whole, *quàcunque via data,*

If the mother and daughter are jointenants, the mother, as survivor, has the whole; so likewise if there be a devise to her by implication; and if both these be against us, then the mother as occupant, or by the statute of frauds as administratrix to her daughter, will be intitled to her moiety.

Note the *variety* of opinions in this case; for *Elizabeth Philips* the mother bringing a bill for an account of the profits of her daughter's moiety since her death, and the cause being heard before the Master of the Rolls, he held that *Elizabeth* and *Martha* were jointenants, and that all survived to *Elizabeth.*

Upon an appeal to Lord *Somers,* then lord chancellor, his lordship held, that *Elizabeth* and *Martha* were tenants in common, and that *Martha*'s estate determining by her death, the remainder-man or reversioner had a right to that moiety.

Afterwards Lord Keeper *Wright* upon a rehearing, was of [41] opinion, that an estate by implication did arise to *Elizabeth* in *Martha*'s moiety, after the death of *Martha.* But,

Upon his referring it to the court of *C. B.* for their opinion, they conceived, that *Elizabeth* and *Martha* were tenants in common, and that *Martha* had an estate *pur auter vie,* which upon the statute of frauds (that takes away occupancy) ought to go to *Martha*'s administratrix (*scil.*) *Elizabeth* the mother, and that *Martha* had not an estate-tail in the trust, (*z*) for that mergers are odious in equity, and never allowed, unless for special reasons.

(*z*) The estate-tail, which she took in all the lands, was a *legal* estate, and therefore could not unite with her *equitable* estate for life in the moiety. *Tippin* v. *Cosin,* Carth. 272. 4 Mod. 380. See Fearne, Cont. Rem. 52. (6th ed.), and note to *Bale* v. *Coleman,* post, 140.

16. 2. B. 2. 190.
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Salk. 38, 251. Lord Ray. 684. Com. Rep. 96. 2 Eq. Ca. Ab. 242. pl. 7.

One dies intestate leaving an aunt and a grandmother his next of kin: the grandmother is nearer of kin than the aunt, and is entitled to administration in preference to her; neither is the latter to come in for a distributory share. See the same point determined in the case of Woodroff *v.* Wickworth, upon the strength of this resolution. Precedents in Chanc. 527.

DAUBEGNY Bentney, being possessed of a considerable personal estate, died intestate, leaving a grandmother and an aunt his next of kin; the spiritual court granted administration to the grandmother; upon which a motion was made to the court of *King's Bench* for a *mandamus* to the spiritual court, commanding them to grant administration to the aunt, as more near of kin than the grandmother. *Broderick* and serjeant *Darnell* were for the *mandamus*, and Sir *Bartholomew Shower* and *Cheshyre cont.*'

And for the *mandamus* it was urged, that the aunt was nearer of blood than the grandmother, and as such entitled to the preference, by virtue of the statute of 21 H. 8. cap. 5.
[42] That the ordinary had no authority to grant administration contrary to the statute; and that having granted it tortiously, he ought to rectify it.

They admitted, that before the statute of Edw. 3. the ordinary was not compellable to grant administration to the next of kin, and that the administrator was at that time only as a (*a*) servant to the ordinary; but by the 31 Edw. 3. cap. 11. the ordinary was obliged to commit administration to the *nearest and most loyal friends* of the intestate; yet the 21 H. 8. cap. 5. gave the ordinary an election to grant administration to the next of kin, or any in equal degree; but it was said, if the next of kin, at the time of the death of the intestate, were disabled by attainder, *&c.* and afterwards the disability should be removed, the ordinary ought to grant administration to him; but in case administration had been before granted, and pending the disability, it was made a question in 1 Sid. 371. (*Offley* versus *Best*) whether such grant of administration ought not to be repealed, before the next of kin should obtain a grant of it? in regard the interest was vested; (1) but that the difference was, where the administration was granted to the next of blood, and where to a stranger: In the last case,

(*a*) Ante, Petit *v.* Smith. 7.

(1) Vide the several cases upon this subject collected in 1 Com. Dig. Tit. Administrator, (B. 8.) and Went. Off. Exec. 400.

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the new administration ought to be granted without any formal repealing of the first, the very act of granting the new administration amounting to a repeal. 1 Andr. 303. Ow. 50. Cro. Eliz. 460. For that the ordinary had never in this case executed his authority. And therefore, though in *Packman*'s case, 6 Co. 18. b. it was done upon a citation, yet it did not follow that it could not have been done without it; of which opinion was *Popham*, in Cro. Eliz. 460. And if the ordinary might do it without a citation, the court of *King's Bench* would oblige him, and the rather, after he had (as in the principal case) granted it contrary to the statute; but probably the [43] *mandamus* would not confine him to any particular manner of doing it; for which reason it might be done by citation, if that were more proper: besides, the administration might have been granted in time of vacation before application could be made for a *mandamus*.

But afterwards, on great consideration, a *mandamus* was denied by all the court. And,

Per Holt C. J. In the vacation time one may resort to the chancery, and upon a suggestion that the spiritual court has proceeded to grant administration to a wrong person, may have a prohibition out of that court returnable into *B. R.* or *C. B.* (*z*)

The authorities that have been cited, are grounded upon a reason that is not law; for the administrator, at this time, is not a servant to the ordinary, but has as fixed an interest as an executor, who is appointed by the party himself; and though the ordinary be by the statute of 21 H. 8. cap. 5. restrained to grant administration to the next of blood, yet he is not so restrained, as to make an administration granted by him, though contrary to the statute, a mere nullity; for if such administration were void, then all dispositions of the goods of the intestate, pending the said administration, and before the repeal of it, would be void also; and after it was repealed, trover would lie for these goods, which cannot be.

Administration committed contrary to the statute is not void, but voidable. (*y*)

Thus if an administration committed to a creditor, be afterwards repealed at the suit of the next of kin, the creditor shall (*a*) retain against the rightful administrator; and all dis-

(*a*) 6 Co. 18.

(*z*) The court of Chancery has, even in term-time, a concurrent jurisdiction with courts of common law in cases of this kind, *Ex parte Lynch*, 1 Madd. 15, Coop. 325; but does not willingly exercise it, whilst those courts are open. *Montgomery* v. *Blair*, 2 Sch. & L. 136. Et vide *Anon.* post, 476. *Crowley's Case*, 2 Swan. 1.

(*y*) Acc. *Anon.* Com. Rep. 151. but *contrà* as to probate granted to an executor under a forged will, *ib.*

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positions of goods made by him pending the citation shall stand; for this is not like the case of an administration granted by a bishop of an inferior diocese, where the intestate had *bona notabilia* in divers dioceses, because there such administration is absolutely void. (1) It shall be a good return to the *mandamus*, that administration is already committed, and that there is no *lis pendens*. Not that I would be understood to intimate hereby, that in case there had been a citation pending, I should have been for granting a *mandamus;* but without question, before this the motion is made too soon.

[44]

(*a*) 1 Sid. 179. In the case of (*a*) Sir *George Sands*, the administration was granted to the brother, who continued to administer some time, and afterwards, one pretending to be the wife of the intestate, commenced a suit in the spiritual court to repeal the administration committed to the brother, insisting, that it ought to be committed to the wife; and the brother applied here for a prohibition, because the ordinary had a power to grant it either to the wife, or next of kin; and it was held, that the ordinary could not repeal the administration granted to the brother, for that he had executed his authority.

There was the case of *Duncomb* versus *Mason*, where a feme covert died intestate, having debts due to her (which the law does not give to the husband); and administration being granted to the next of blood, the baron sued in the spiritual court to repeal this administration, and after prohibition and declaration thereupon, the question was, whether the husband should repeal this administration?

And resolved he should: on the other side the case of Sir *George Sands*, was objected, but the court were of opinion, this case was not at all affected by that of Sir *George Sands*, for that the husband had an original right by the 31 Edw. 3. cap. 11. as the *most loyal friend* of the wife, and was not within the 21 H. 8. cap. 5. so that the ordinary had not an election in case of the husband.

[45]

It was also held, that the grandmother was, at least, as near of kin as the aunt; for in the case of a descent of lands, it would be a mediate descent, and the *medium* to both was the father; and it was enough to say brother and heir, or sister and heir, which was the great reason in the case of (*a*) *Collingwood* and *Pace;* and the grandmother seemed to have the advantage, she being of the right line, and the aunt

(*b*) 1 Vent. 413.

(1) *Ravenscroft* v. *Ravenscroft*, 1 Lev. 305.

of the collateral; wherefore for these reasons a *mandamus* was denied. BLACKBOROUGH v. DAVIS.

Note; Sir *Barth. Shower* cited the case of *Burton* versus *Sharp* last *Trinity* term, where administration was sued to be granted to the great grandmother, upon which the aunt moved for a prohibition in *C. B.* to stay the suit in the spiritual court, but a prohibition was denied.

The court having thus refused a *mandamus* for the (*a*) repealing this administration, and for the granting a new one to the aunt, a motion was afterwards made by serjeant *Darnel* and *Broderick*, for a *mandamus* to be directed to the judge of the prerogative court, commanding him to direct distribution of the intestate's personal estate to the aunt as well as the grandmother. (*a*) 1 Salk. 251.

It was insisted, that this method was proper, the aunt being intitled to distribution by the 22 & 23 Car. 2. equally with the grandmother; that the distance of degrees was to be computed from the intestate, and not between themselves; that by the canon law the aunt was as near in degree as the grandmother; and tho' the civil law (*b*) differed from the canon, yet that could not bind us here; that the design of the 22 & 23 Car. 2. was to fix a rule in distributions, and not to leave it to the discretion of the judge; that every person intitled to his distributory share had an interest (*c*) vested in him before distribution actually made †; that the degree of relation between the aunt and the nephew was only *mediante patre;* and in a writ of formedon, the plaintiff, in making out his title, might, without mentioning any other, derive it immediately from the father: that it was true, by the civil law, the grandmother (or indeed any ancestor immediately lineal to the intestate, tho' never so remote), should be preferred, as being in the lineal ascending line, and *in loco parentis*, before the brother and sister or any other in the collateral line; but that seemed against all reason; that in the case of *Carter* versus *Crawley*, Raym. 494. no notice was taken of the grandmother. [46] (*b*) 1 Inst. 23. b. (*c*) 3 Mod. 58. 1 Vern 403. 2 Vern. 274.

Sir *Barth. Shower cont'*: The 22 & 23 Car. 2. does not warrant this *mandamus;* for it does not oblige or enable the

† *Carthew*, 51. So that though a person entitled to distribution dies before distribution made, yet it shall vest in him, the clause directing that distribution shall not be made until a year after the death of the intestate, being merely for the benefit of creditors. But it is to be observed, that though each distributory share vests on the intestate's death, yet the same doth not so vest as to exclude a posthumous child. Vide post. Vol. II. 435. *Edwards & al'.* versus *Freeman & al'.*

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ordinary to do any thing which was not the course of their courts before; it may, possibly, be a good cause of appeal, but can be no ground for a *mandamus*, being a matter of ecclesiastical jurisdiction; by the civil law, the grandmother is nearer of kin than the aunt. I admit a *mandamus* may be granted to make distribution *generally* among the next of kin, but not to command the ordinary to grant distribution to *A.* and *B.* as next of kin in *particular;* for that would be to take from the spiritual courts the power they have of judging [47] which degree of relation is next of kin, when the subject matter does not belong to the temporal courts (1); as it may, when the dispute is betwixt the administrator and a creditor.

No *mandamus* will lie to give a specific legacy or sum of money to a particular legatee; and those who are intitled to (*a*) 2 Vern. 710. and post. Trevor *v.* Trevor, 628. a distribution, as next of kin, are (*a*) legatees in law, no others being appointed by any will.

Mandamus lies to the spiritual court to direct them to do right, as a prohibition lies to stop them from doing wrong.

Holt C. J. If the ecclesiastical judge act contrary to law, may not this court oblige him to pursue the law? Is there any difference betwixt granting a prohibition to stop them from going wrong, and a *mandamus* to guide them right?

A prohibition was granted upon this statute *inter Smith* and *Tracy*, 1 Vent. 307. 316. 323. and the consultation awarded afterwards, was not because the prohibition did not regularly lie, but for that the ecclesiastical court proceeded and determined right; and as to appealing, if the constant opinion of the civilians be against the rule of law, it is then in vain to put the party to his appeal; as was resolved in the (*b*) Salk. 547. Carth. 142. case of (*b*) *Shotter* versus *Friend*, where they would not admit of proof of payment of a legacy by one witness.

Shower: The superior court never sends a *mandamus* to an inferior court to act contrary to their rules and opinions; as on a reversal of a judgment, it is the superior court that (*c*) Vide Salk. 403. gives the (*c*) new judgment; the superior court often sends prohibitions to inferior courts, but how can this or any other court command a judicial officer to act against his opinion?

[48] Afterwards Dr. *Lane* argued against the *mandamus*, that the grandmother stood in the place of the father and mother, who, by the civil law, had the right of succession, exclusively of the brothers and sisters; that the grandmother, by the civil law, stood in the second degree to the intestate, and the aunt in the third. It was true, the canon law differed in

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(1) Anon. 1 Stra. 552. *Bouchier* v. *Taylor*. 7 Bro. P. C. 414.

placing the aunt in the second degree, the reason of which was, on the account of marriages, for in that particular, they were apt to confound the degrees of nature; that the aunt in this case was the daughter of the grandmother, and could not be in equal degree with her mother; so neither could she be intitled by the statute of distributions, nor consequently to a *mandamus;* that the children of uncles had no right to distribution by representation, in concurrence with the uncles, as had been adjudged, and confirmed by constant practice; that if mothers' children before the statute of 1 Jac. 2. c. 17. had no right to distribution, then surely the grandmother's children could have no right, till it was given them by some law.

Holt C. J. If a child had died intestate without wife, child, or father, living only the mother, the mother had the whole till 1 Jac. 2. (*z*) exclusive of the brothers and sisters; and there must be the same law now, as to the grandmother with relation to the aunts; the father surviving has the child's whole estate at this day.

Cheshire: No *mandamus* ought to go, at least till the court have erred, for this court will not anticipate the judgment of the spiritual court.

Holt C. J. Before the statute of Ed. 3. the ordinary having the power of distribution, used to dispose of part among the relations, and the other part to charities; but that statute took away such right from the ordinary, and (*a*) fixed the title to the personal estate in the administrator. And before the 22 & 23 Car. 2. the ordinary could not (*b*) compel the administrator to make distribution, but was from time to time prohibited. I would fain know how it comes to pass, that the spiritual court have not pursued the ancient civil law, but have varied that by the Novels?

[49]

(*a*) Ante 43.

(*b*) 1 Lev. 233. and post. Edwards versus Freeman, Vol. II. 441.

Dr. *Lane:* Before the Novels were introduced, the courts proceeded by the rules of the customary law, and afterwards were never intirely directed by the Novels, which were not introduced till the thirteenth century: and as to the canons there are some of them which expressly give the preference to the grandmother before the brothers and sisters of the intestate; and it was the mercy of the civil law, to let in the brothers and sisters.

(*z*) *Keylway* v. *Keylway*, Vol. II. 346.

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Chief Justice: The statute of 1 Jac. 2. allowed the proceedings of the spiritual court to be right, as the law then stood, but thought it unreasonable that the mother (who might marry again) should carry away all; and therefore the parliament let in the intestate's brothers and sisters equally with the mother; but still the father has all. If the spiritual court, since the statute of Car. 2. shall attempt a distribution, contrary to the rules of the common law, we will prohibit them; for by that statute, they are restrained to the rules allowed among us.

Afterwards, in Hil. term following, it was resolved *per tot' cur'*, that a *mandamus* should not be granted, and *Holt* C. J. delivered the reasons:

[50]

How the law stood formerly with regard to distribution and inheritance.

The laws of *England*, and not any foreign laws, ought to govern this case. It must be observed, that by the ancient laws here, both before and at the conquest, all the descendants, sons and daughters in general, did inherit as well the real as personal estate of the ancestor (*a*) equally, and in a like proportion; and so it appears in Selden's Eadmerus, 184. Lambard's Saxon Laws 36. fo. 167. *Si quis intestatus obierit, liberi ejus hæreditatem equaliter dividant*, &c. But in process of time new laws were introduced; and the change seems to have begun *tempore Henrici Primi*, when the females, in case there were males, were excluded from the inheritance of the real estate; but the males inherited equally all the socage lands. Glanville, lib. 7. cap. 3. But at that time, if a child died without issue, the land went to the father or mother, in preference to any of the collateral line; as you may see in Lambard, 202, 203. *inter leges Henrici Primi, cap.* 70. *Si quis sine liberis decesserit, pater, aut mater ejus in hæreditatem succedat, vel frater et soror, si pater et mater desint; si nec hos habeat, soror patris vel matris, et deinceps qui propinquiores in parentela fuerint, et dum virilis sexus extiterit, et hæreditas abinde sit fœmina non hæreditet.* And this law is cited by lord *Coke* in his comment on Littleton, fo. 11. where he says, he never read an opinion in any book old or new, (Lambard was not then published) against the maxim, that inheritances cannot lineally ascend; but only *in Libro Rub', cap.* 70. which record in the exchequer is notwithstanding of great authority even at this day. But this law of succession did not continue long, being altered betwixt the times of H. 1. and H. 2. when the father and mother were excluded, and the inheritance carried over to the collateral line, as appears by Glanv. lib. 7. cap. 1, 2, 3, 4.

(*a*) See Hale's History of the Common Law, p. 220. and post. Clements versus Scudamore, 64.

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However, this alteration of the descent was made only as to the real estate, and did not extend to the personal estate; for as to that, the father and mother had always the preference before the brothers and sisters, which is a plain demonstration that they were esteemed nearer of kin. *Vide* 1 Vent. 414. And then, by the like reason, the grandmother must be preferred before the aunt.

I admit, that new laws were introduced in the latter end of *Justinian's* reign, but they were such as had been in ancient practice in the *Prætorian* court, (*viz.*) the (*a*) brothers and sisters were let in to share with the father and mother; but all other collaterals more remote were excluded; and the grandfather and grandmother were preferred before the uncles and aunts. It appears from *Ridley's* view of the civil law, (*page* 63.) that the grandmother, *&c.* of the ascending line, to the utmost degree, was anciently preferred before the nearest collaterals; but that may now be altered by the statute of Car. 2. which prefers the next of kin, tho' collateral, before one, tho' lineal, that is more remote.

(*a*) But such brothers and sisters must have been of the whole blood, or ex utrisque parentibus conjuncti. Hale's History of the Common Law, 213.

But in our case, the grandmother is nearer of kin to the intestate than the aunt; for the aunt is not of kin to the intestate, but as she derives her kindred from the grandmother her mother, and therefore not in equal degree; besides, where one is lineal and the cause of the kin, and the other collateral, the person who is lineal shall be preferred; here the grandmother is the root of the kindred, and so must be nearer than they that derive their relation from her.

This rule of succession in the ascending line is agreeable to the laws of other nations; for by the constant practice of the *Jewish* (*b*) nation, for want of issue of the son, the father succeeded to the purchase of the son, excluding the brother, according to the construction of the *Jewish* doctors, upon the xxvii. chapter of *Numbers*. As you find it in *Selden, De Successionibus apud Hebræos,* cap 12. And, indeed, by all laws, (excepting that of *Justinian*) the father was preferred to the brother; but our case falls not within the reason of *Justinian's* law; tho' if it did, the civil law obliges us here, only as it has been anciently received, and it could not have been received *tempore Henrici Primi,* who lived about the year of our Lord 1100; for that the works of *Justinian* were first † published

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(*b*) Hale's History of the Common Law, 209.

† The works of *Justinian* were published in the following manner, *viz.* The *Code* was the first book which the emperor *Justinian* ordered to be collected (for the most part) out of the constitutions of the former emperors dispersed in the *Gregorian, Hermogenian,* and *Theodosian Codes.* There are only some fragments

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about *anno Dom'* 560, and were practised about forty years; after which they were totally neglected in the empire for 500 years, and new laws were set up by the emperor *Basilius*, which were followed till the taking of *Constantinople*, *anno* 1453, and till the year 1125, (which was the 25 H. 1.) the laws of *Justinian* were not again heard of; but about that time were found by *Lothar* at the taking of *Amalfi*, and were published at the university of *Bologna;* as appears by Mr. *Selden*'s notes on *Fortescue*, cap. 18, 19. Selden of Tithes, 490. and also in a (*a*) treatise *de usu et authoritate juris civilis Romanorum*, by Dr. *Duck*, who was reputed to be an eminent and learned civilian.

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(*a*) Lib. 1. cap. 5.

So *per tot' cur'* a *mandamus* was denied.

Grandfather on the father's side and grandmother on the mother's side equally entitled by the statute of distributions.

See the case of *Moor* and *Barham*, 13 *May* 1723, at the Rolls: one died intestate, leaving a grandfather by the father's side, and a grandmother by the mother's side, his next of kin; these (grandfather and grandmother) shall take in equal moieties by the statute of distribution, as being in equal degree; for tho' the grandfather by the father's side, may, in some respects be more worthy of blood, yet here dignity of blood is not material; in regard the brother of the (*b*) half blood shall take equally with the brother of the whole blood; and the Master of the Rolls (Sir *Joseph Jekyll*) was so clear as to this point, that he would not suffer it to be debated.

(*b*) Cases in Parl. 108. Carth. 51.

left of the two first, but the *Theodosian* is entire: this work, though first set about, did not come out till the year 534. 2. The *Digest* or *Pandects* came forth in the year 533, and is divided into fifty books; it is collected from the commentaries of the ancient lawyers, their *responses*, and other writings. 3. The *Institutes* came out also in the year 533, and are divided into four books; they are a system of the whole body of the law, but not so distinct and comprehensive as it might be, neither so useful at this day as at first; the Institutes sometimes correct, or are contrary to the Digest. But the second publication of the Code came out after them, in which some things are omitted which the Institutes refer to from the first publication. Last of all, the *Novels* or *Authenticks* were published at several times without any method; they are called *Novels*, because they are *new* laws; and *Authenticks*, because they are translated exactly and *authentically* from the *Greek* tongue. Vide Wood's Institute of the Civil Law, in the Introduction, p. 5 & 6.

BAMFIELD *versus* POPHAM.

CASE 10.

Salk. 236. 2 Vern. 427, 449. 2 Eq. Ca. Ab. 308. pl. 12. No estate raised by implication in a will can destroy an express estate; as where a devise was to *A.* for life, remainder to his first son, and so to every other son in tail male; and for want of issue male of *A.* remainder over: This was no estate-tail in *A.* by implication. (1) Q. Whether this case be not wrong reported by Salkeld? (2)

THE case in effect was: *A.* seised in fee of the lands in question, devises them to trustees and their heirs, to the use of them and their heirs, in trust for the defendant *Popham* for life, with remainder to his first, *&c.* son successively in tail male, and *for want of issue male of Popham*, remainder over.

4. Tu. 4 Cr. 827.

Afterwards, the testator by a *codicil*, reciting that he had by his will given the premisses to *Popham*, and the *heirs male of his body*, now he wills, that if that estate should determine, and *Popham* should die *without issue male*, then his estate shall be disposed of in such manner, *&c.*

Popham had no issue male, and on the remainder-man's bringing a bill to stay waste, the questions were, 1st. whether the words of the will, (*scil.*) *for want of issue male of Popham*, did not by *implication* give an estate-tail to *Popham*, and consequently render him dispunishable for waste? or, [55]

(1) The cases upon this subject are collected in *Robinson* v. *Robinson*, 1 Burr. 44. Vide also *Allanson* v. *Clitherow*, 1 Vez. 24. (*z*) *Lethieullier* v. *Tracy*, 3 Atk. 784. *Evans* v. *Astley*, 3 Burr. 1570. *Doe* v. *Applyn*, 4 T. R. 82. *Hay* v. *Earl of Coventry*, 3 T. R. 83. (*y*) from all which cases it seems that no general rule is laid down in the construction of words of this kind, but that courts both of law and equity consider the raising estates by implication as depending upon such implication being necessary to *effectuate the general manifest intention of the testator*. Vide *Attorney General* v. *Sutton & Payman*, post. 754. (*x*)

(2) So said in *Allanson* v. *Clitherow*, 1 Vez. 26.

(*z*) *Vaughan* v. *Farrer*, 2 Vez. 186.

(*y*) *Denn* v. *Puckey*, 5 T. R. 299. *Doe* v. *Burnsall*, 6 T. R. 30. *Burnsall* v. *Davy*, 1 Bos. & P. 215. *Daintry* v. *Daintry*, 6 T. R. 307. *Doe* v. *Hally*, 8 T. R. 5. *Doe* v. *Cooper*, 1 East, 229. *Rex* v. *M. of Stafford*, 7 East, 521. *Doe* v. *Bluck*, 6 Taunt. 485. 2 Marsh, 170. *Romilly* v. *James*, 6 Taunt. 263. *Doe* v. *Goldsmith*, 2 Marsh. 517. 7 Taunt. 209. *Merest* v. *James*, 1 Brod. & B. 484. *Aspinall* v. *Petvin*, 1 S. & S. 544.

(*x*) See also 2 Fonbl. Eq. 56. note(*h*)

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Secondly, whether (admitting the words in the will did not give an estate-tail) the codicil, reciting that the testator had by his will devised the premisses to *Popham* and the *heirs male of his* body, would not so far influence and explain the will, as to make it an estate-tail, though it were not so before?

And this having been argued already in chancery, came now to receive a solemn determination before Lord Keeper *Wright*, C. J. *Holt*, C. J. *Trevor*, Sir *John Trevor*, Master of the Rolls, and *Powel* J. who all gave their opinions *seriatim*, that *Popham* had only an estate for *life* by the will, and that the same was not enlarged or altered by the *codicil*.

First, they all resolved, that here being an express estate given to *Popham* for life, with remainder to his first and every other son, &c. the words [if *Popham* should die without issue male] should not enlarge this estate to an estate-tail; in regard these amounted only to make an estate-tail by implication; and words of implication would never destroy what was before expressed (*a*) so that the words [if he should die without issue male] could mean no more, than if he should die without *sons*.

(*a*) Ante 21. Fisher *v.* Wigg.

And though it might be objected, that unless these words were construed to create an estate-tail in *Popham*, then a *posthumous* son would not take, (*z*) which would be contrary to the intention of the testator:

The answer was, that notwithstanding it might have been intended that such posthumous son should take, yet the testator was herein mistaken as to the law, or might not consider of it; and this was but a remote mischief or contingency; whereas it was very obvious, that the testator intended it should not be in the power of *Popham* to bar the remainders, which it was plain he could do, if he had an estate-tail; so that this being a mischief near and easy to be foreseen, it was certainly in the intent of the testator to obviate and prevent the same; and it was a maxim in law equally certain, that where there is an express estate limited, no implication (*b*) ought to be admitted to controul it; *expressum facit cessare tacitum*.

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(*b*) Post. Idle v. Cook, 78, and Humberstone v. Humberstone, 333.

Et per Trevor C. J. In the case of (*c*) *Penhay* versus *Hurrel* it was held, that if there be *cestuy que trust* for life, remainder to his first, &c. son in contingency, the *cestuy que trust* for life cannot destroy the contingent remainders (*y*): and the de-

(*c*) 2 Vern. 370.

(*z*) See *Burdet* v. *Hopegood*, post. 486. Tal. 151. *Hopkins* v. *Hopkins*, 1 Atk.
(*y*) *Chapman* v. *Blissett*, Ca. temp. 590.

vise in the principal case being by way of *trust*, that may support the right of a posthumous son: but to raise an estate by intention or implication, contrary to what is before expressed, is to say, a man thinks differently from what he speaks, which is unnatural and unreasonable. It is true, if I devise an estate to *A.* for life, remainder to the heirs of his body, in this case, notwithstanding the express estate for life, yet the subsequent words do merge and destroy it, by turning it into an estate-tail; but the reason is, because here such subsequent words are express words; heirs of his body are express words of inheritance, and a limitation in tail; which is an answer to the objection from *Lewis Bowles*'s case (11 Co. 80.); for there also we find an express limitation in tail: but in the principal case, the raising an estate-tail by implication would contradict the express limitation, and consequently the intent of the testator.

As to *Sunday's* (*a*) case in 9 Co. 127. b. there was a devise to *A. generally* (expressing no estate), and if *A.* should have no issue male, remainder over, which for that reason, was rightly adjudged an estate-tail. [57]

(*a*) Post. 605. Blackborn v. Hewer Edgley, et è contra.

Powell J. There is no difference between a deed and a will in this case; for if a man does by deed give lands to *A.* without expressing any estate, and afterwards adds the words, If *A.* die without issue, then to *B.* this makes an † estate-tail. Perk. sect. 173.

As to *Robinson's* case cited by lord *Hale*, 1 Vent. 230. *King* versus *Melling*, if I devise lands to *A.* for life, and if he die *sans* issue, then to *B.* as this case is put in Moor, 682. and 1 Roll. Abr. 837. pl. 12. it differs from the case put by lord *Hale* (*viz.*) no *express estate for life* is given to *A.* But if it be law as put by lord *Hale*, it must be upon this supposition, that the devisee over was heir at law (*viz.*) one devised lands to *A.* for life, and if *A.* died without issue, then to his [the testator's] right heir: now this might be allowed to be an estate-tail in *A*, without contradicting the resolution in the principal case; for where the devisee over was heir, there must have

† But of this the Lord Keeper doubted. And vide *Vaugh.* 259. et ante, *Fisher* versus *Wigg* contra. (*z*) But his Lordship held, that where in the premisses an estate is given by deed to one and his heirs, and if he die without issue, *&c.* these words are sufficient to restrain the former words, and turn the fee into an entail, but will not of themselves create an estate-tail.

(*z*) Vin. Ab. Estate, R. pl. 2. and see *Idle* v. *Cook*, post. 78. and 2 Lord Ray. 1152. S. C.

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been a most necessary implication, that *A.* the first devisee should have an estate-tail, because the heir of the testator was excluded from taking, until the first devisee died without issue (*z*) which distinction serves also to answer *Burley's* case, put by lord *Hale* in the same place in Ventris.

With regard to the case of *Clark* and *Day*, reported 1 Roll. Abr. 839. pl. 4. Moor, 593. Owen, 148. Cro. Eliz. 313. where one devised land to his daughter *Rose* for life, and if she married after the testator's decease, and had heir of her body, that then such heir should have it after her death, and the heirs of their bodies; and if she should happen to die without issue, then the testator devised the premisses to his daughter *P.* It is indeed said *per Rolle*, that *Rose* had an estate-*tail*†, but by *Moor* (with whom Lord *Hale* agreed in *King* and *Melling*'s case) *Rose* had only an estate for *life*; though in the arguing of the case of *King* and *Melling*, the roll being brought into court, it appeared that no judgment was ever entered. In the case of *Loddington* and *Kyme* (*a*), C. B. 7 W. 3. a devise was to *T. S.* for life, remainder to his issue, and if he died without issue, then to another; yet resolved that *A.* had an estate for *life* only, in regard the words were express.

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(*a*) 3 Lev. 431. and Salk. 224. in both which places the case is reported stronger than here cited, there being the clause, without impeachment of waste, and also words of limitation superadded to the devise to the issue.

As to the *second* point, (*viz.*) whether the testator's recital in his codicil, that he had devised the estate to *Popham*, and the heirs male of his body, would alter and enlarge the estate given to him by the will?

It was resolved, it should not; these words being sufficiently satisfied, though *Popham* had no estate-tail; for, *ad vulgus*, where an estate is settled upon one for life, remainder to his first, &c. son, this is usually called *intailing an estate*; that is, when it is so limited as not to be in the power of the first taker to dispose of it; and every one that is to claim by such settlement must be heir male; for the first son after the death of his father is heir male.

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But if it were not so, and the recital false in this respect, yet, *per Holt* C. J. a false recital in a will shall not amount

† It appears from the report of this case in *Croke*, that *Gaudy* and *Fenner*, Justices, held, *Rose* had but an estate for life, against the opinion of *Popham* C. J. who thought she had an estate-tail.

(*z*) See *Nottingham* v. *Jennings*, ante, 23.

to a devise. (1) As in 2 Ventris, 56. *Wright* versus *Wyvell*, one by will recited, that he had given an estate to his wife for her jointure, whereas in truth he had not, and resolved, that the will did not amount to a devise, nothing being intended to pass thereby. (*z*)

Thirdly, It was agreed likewise, that the word [heir] was not always and of necessity to be intended as a word of *limitation*; thus in 2 Vent. 311. *Burchet* versus *Durdant*, a devise to *A.* for life, remainder to the heirs male of the body of *A.* now living, these were words of *purchase:* So in Raym. 278. 2 Jones 114. *Lisle* versus *Grey*. Lands were limited to *A.* for life, remainder to his first and every other son in tail, and so severally and respectively to every of the heirs male of the body of *A.* and the heirs male of the bodies of such heirs male, in this case the words [heirs male] were understood to signify *sons*, and to be words of *purchase*. (2)

Upon which, the court decreed an injunction to stay waste; and an account to be taken of what timber had been already felled. †

† *Vide* the case of *Langley* v. *Baldwin*, referred *May* 1707, out of chancery to the judges of *C. B.* and how that differed from the case above, forasmuch as the limitation there being not to all the sons of the grandson, if there had been more than six, and the six had died without issue male, unless it had been construed to be an estate-tail in the grandson, the remainder-man must have had the lands in preference to a seventh son. *Vide* also post, *Attorney General* v. *Sutton* and *Payman*.

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(1) So *Right* v. *Hamond*, 1 Stra. 427. *Attorney General* v. *Sutton*. post. 754.
(2) Vide *Bale* v. *Coleman*, post. 142. and *Papillon* v. *Voice*, Vol. II. 471.

(*z*) *Skerratt* v. *Oakley*, 7 T. R. 492.

4. Mu. & Cr. 665.

CASE 11.

Lord Keeper WRIGHT and Master of the Rolls.

2 Eq. Ca. Ab. 286. pl. 2.

A voluntary conveyance made to the brother by the half blood, but which was void and defective at law, made good by a court of equity, against the heir, (1)

WATTS *versus* BULLAS.

J. S. made a voluntary conveyance to his brother by the half blood, which was void and defective at law; afterwards *J. S.* died without issue, upon which the brother (who by reason of the half blood could not be heir to *J. S.*) brought his bill against the heir, to compel him to make good this conveyance.

(1) The authority of this case is controverted by Lord *Hardwicke* in *Goring* v. *Nash*, 3 Atk. 189. and it seems now to be established, that a defect in the surrender of a copyhold, or the execution of a power (which are governed by the same rules, *Chapman v. Gibson*, ub. inf.), shall be supplied *only* in favour of three descriptions of persons, *viz.* creditors, wife, and children, *Goodwyn* v. *Goodwyn*, 1 Vez. 228. *Byas* v. *Byas*, 2 Vez. 164. *Tudor* v. *Anson*, 2 Vez. 582. (*z*), and so, though the wife or child hath only a limited interest (as an estate for life) in the subject, with remainder over to strangers, *Marston* v. *Gowan*, 3 Bro. C. C. 170.—But it shall not be supplied in favour of a wife or younger child, if the heir at law, *being a child* of the testator, &c. (*y*) be thereby left *unprovided for*. *Kettle* v. *Townshend*, 1 Salk. 187. *Hicken* v. *Hicken*, 6 Vin. 59. pl. 20. *Hawkins* v. *Leigh*, 1 Atk. 387. It is not material whether the heir in that case be wholly *disinherited by his father*, so that he hath some provision. *Hawkins* v. *Leigh*, 1 Atk. 387, *Chapman* v. *Gibson*, ub. inf. *Pyke* v. *White*, in *Linc. Inn Hall*, 20 *July*, 1791. 3 Bro. C. C. 286. (*x*). Nor is it material (although formerly doubted as in *Ross* v. *Ross*, 1 Eq. Ca. Ab. 124.) whether the younger children are otherwise provided for, or not, *Kettle* v. *Townshend*, ub. sup. *Carter* v. *Carter*, Mos. 370. *Burton* v. *Floid*, 6 Vin. 56. pl. 20. *Weeks* v. *Gore*, 6 Vin. 57. pl. 24. *Cook* v. *Arnham*, post. Vol. III. 283. and Ca. temp. Tal. 35. S. C. *Tudor* v. *Anson*, 2 Vez. 582. *Pyke* v. *White*, ub. sup. So, with respect to the wife. *Biscoe* v. *Cartwright*, Gilb. Rep. 121. *Smith* v. *Baker*, 1 Atk. 386. (*w*) The same rules obtain between coheirs at law, and between heirs in gavelkind, as between the eldest son and younger children, *Baker* v. *Jennings*, 6 Vin. 54. pl. 10. *Andrews* v. *Waller*, 6 Vin. 237. pl. 12. But if the heir at

(*z*) Not of a husband, *Moodie* v. *Reid*, 1 Madd. 516; nor of a grandchild, *Perry* v. *Whitehead*, 6 Ves. 544.

(*y*) Or a grandchild, *Rodgers* v. *Marshall*, 17 Ves. 294.

(*x*) Nor is the amount of the provision material, *Garn* v. *Garn*, 16 Ves. 268. The doctrine of inquiring into the provision of the heir was impugned by Lord *Rosslyn*, in *Hills* v. *Downton*, 5 Ves. 557; but the later decisions are in favour of it. *Garn* v. *Garn*, *Rodgers* v. *Marshall*, ub. sup. See Lord *Alvanley*'s remarks on *Hills* v. *Downton*, in Sugden, Powers, Appendix, No. xii.

(*w*) *Fielding v. Winwood*, 17 Ves. 90.

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For the defendant it was objected, that this being a voluntary conveyance, it ought not to be made good in equity, especially against an heir at law.

But Lord Keeper was of opinion, that as the consideration of blood would at common law raise an *use*, and as before the statute of 27 H. 8. such *cestui que use* should have compelled an execution of the use in a court of equity; so would this imperfect conveyance raise a *trust*, in respect of the consideration of blood, and consequently ought to be made good in equity.

And it being said by Mr. *Pooley*, that though a conveyance to younger *children* would, if void at law, be made good in equity; yet it had been decreed in the House of Lords, that they would not supply the want of a surrender in case of a devise of a copyhold to *grandchildren;* and by the same reason equity should not regard the relation of a *half-brother*: [61]

To this the Master of the Rolls answered, that it was his opinion, such a devise of a copyhold, without a surrender, ought to be made good for *grandchildren*, as well as *children*; and if the same case were to come *now* into the House of Lords, it would be so ruled†, and that he had, and would decree it so.

So would the want of a surrender, in case of a devise of a copyhold to grandchildren. (1)

† The like was also declared *per* Lord *Harcourt* in the case of *Freestone* v. *Rant*, *Trin.* 1712. And it is observable that the case of *Kettle* and *Townshend* (here referred to by Mr. *Pooley*) being cited before Lord *Cowper*, in the case of *Fursaker* v. *Robinson* (2), *Mich.* 1717, his Lordship doubted thereof, in regard the *grandfather*, by the act 43 Eliz. for maintaining the poor, is bound to maintain his *grandchild;* which he said, he believed was not taken notice of in that case.

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law be *not* a *child* of the testator, *&c.* although *wholly unprovided for*, the defect shall be supplied in favour of the wife, *Chapman* v. *Gibson*, at the Rolls, *Feb.* 1791, 3 Bro. C. C. 229. (*z*)—Many of the cases, in which these questions have occurred, have been decided on another point, *viz.* whether it sufficiently appeared that the testator intended to devise the unsurrendered copyhold. As to which vide *Harris* v. *Ingledew*, post. Vol. III. 98. (*y*)—For the cases, which more particularly respect *defective executions of powers*, vide *Tollett* v. *Tollett*, post. Vol. II. 489.

(1) Contra, *Tudor* v. *Anson*, 2 Vez. 582. (*x*)

(2) Pre. Cha. 475, and 1 Eq. Ca. Ab. 123. pl. 9.

(*z*) *Fielding* v. *Winwood*, ub. sup.

(*y*) *Drake* v. *Robinson*, post. 443. *Addis* v. *Clement*, post. Vol. II. 456. As the Stat. 55 G. 3. c. 192, has enabled copyholders to devise their tenements, though not surrendered to the use of their wills, questions of this sort can no longer arise upon devises. But the doctrine of the cases above-cited applies also to cases where a surrender is requisite, in order to give effect to a deed. *Rodgers* v. *Marshall*, ub. sup. and see *Fursaker* v. *Robinson*, Pre. Cha. 475.

(*x*) *Perry* v. *Whitehead*, 6 Ves. 544.

CASE 12.

WHITE *versus* NUTTS.

2 Eq. Ca. Abr. 687. pl. 3. On casualties happening between the articles for a purchase and the sealing of the conveyance, who shall bear the loss.

ONE by articles, reciting that he had an estate for two lives in a church lease, covenanted to convey his title to the premisses by such a day, to *J. S.* as *J. S.* or his counsel should advise.

It happened, that after the articles, and before the time appointed for the conveyance, one of the lives dropt. And the question being upon whom the loss should fall?

[62] It was decreed *per Lord Keeper:* (1) that in regard here was no default in the seller in making the conveyance, the loss of the life ought to be borne by the purchaser, in the same manner as if the reversioner had articled to sell the reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should there have had the benefit of it; and in each case, in equity, the estate is as conveyed from the time of the articles sealed. (*z*)

But his Lordship seemed to think, that if *all* the lives had dropt before the execution of the conveyance, it might have been another consideration, for that the money was to be paid upon the conveyance, and no estate being left, there could be no conveyance.

Quær. tamen, the reason of this distinction between the loss of part and of the whole, and *vide* the case of *Cass* v. *Rudele & al'*. 2 Vern. 280. (2)

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(1) Reg. Lib. B. 1702. fol. 47.

(2) Vide also *Pope* v. *Roots*, 7 Bro. P. C. 184. And *Mortimer* v. *Capper*, 1 Bro. C. R. 156. In *Pope* v. *Roots*, Lord *Apsley* observed that the case of *Cass* v. *Rudele*, as reported by *Vernon*, was wholly misrepresented; that by the printed cases in the House of Lords in *Decem.* 1692, it appeared, that *Cass* did make a title in *Jan.* 1691, by conveyance then executed; that *Tilly* died in 1692, and the earthquake did not happen till *July* 1692; and so far from *Rudele* not having sufficient effects of *Tilly* in his hands, the decree stated, that *Rudele* had by his answer admitted he had then in his hands 700*l.* residue of the purchase-money; and the decree for payment was founded on a good title having been made to him of the premisses.

(*z*) As in equity the estate belongs to the purchaser from the time of his entering into the contract, he is entitled to all benefit. *Ex parte Manning*, post. Vol. II. 410. *Mortimer* v. *Capper*, 1 Bro. C. C. 156. *Jackson* v. *Lever*, 3 Bro. C. C. 605. and must bear all loss, *White* v. *Nutt*, sup. *Paine* v. *Mellor*, 6 Ves. 349. *Revell* v. *Hussey*, 2 Ba. & Be. 287. *Harford* v. *Purrier*, 1 Madd. 532. which may happen to the estate between that time and the time of completing the purchase. As to sales before the Master, see *Ex parte Manning*, ub. sup.

4. Tu. 4 Ox. 326.
1. — —. 427.

CLEMENTS *versus* SCUDAMORE.

CASE 13.

IN ejectment the jury found this special verdict: *J. S.* had issue five sons, the youngest of which died in the life-time of *J. S.* leaving issue a daughter (the lessor of the plaintiff), after which *J. S.* purchased the lands in question, which were copyhold, and of the nature of *Borough-English*, descendible by the custom to the *youngest son and his heirs*; *J. S.* died seised, and the fourth son entered; upon which the question was, whether the fourth son, or the daughter of the fifth son should inherit these lands? and after several arguments at bar,

Salk. 243. 6 Mod. 120. 2 Ld. Raym. 1024.

One seised of a copyhold in fee in nature of Borough-English has five sons, the youngest of whom dies in the life of the father, leaving issue a daughter, and then the father dies; the youngest son's daughter is inheritable.

C. J. *Holt* delivered the opinion of the whole court in favour of the daughter, (*viz.*) that she ought to inherit these lands *jure repræsentationis.*

Wherever this custom has obtained, the youngest son is there placed in the room of the eldest, who inherits by the common law; and there is no difference * in the course of descents, but that the custom prefers the youngest son, and the common law the eldest; and therefore, as by the common law the issue of the eldest son, female as well as male, do, *jure repræsentationis*, inherit before the other brothers, so by the same reason, when this custom has transferred the right of descent from the eldest to the youngest son, it shall also, by the like representation, carry it to the daughter of the youngest son: and there is no ground to make any difference betwixt a descent by this custom, and by the common law.

The youngest son by Borough-English, and his representatives, are as much heirs to the Borough-English lands, as an eldest son or his representatives are heirs to lands descendible at common law. [*64]

Tho' Lord *Coke* be of another opinion, yet it appears from the best authors, as Lambard's Saxon Laws, *inter leges Gulielmi Primi*, 36. fo. 167. and Selden in Eadm. 184. That all the lands in *England* were at first, and before the conquest, in

All lands in England before the conquest, were in nature of gavelkind, and descendible to all the issue equally; and yet the right of

when the introduction of tenures and knights' service had made several alterations, representation continued.

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(a) Vide ante, Blackborough v. Davis. 49.

nature of (a) gavelkind, and descended equally to all the issue; but this was soon afterwards altered, when tenures by knights' service were introduced for the defence of the realm; for then, in order the better to preserve the family and tenure, the descent was restrained only to the eldest son; but yet, notwithstanding this alteration, the right of representation continued to take place; and by the common law, if the eldest son happened to die in his father's life-time, leaving issue a daughter, the inheritance descended to her in preference to any of the other sons, so that the female, by way of representation, was yet preferred to the males, because the right of representation was not altered.

Right of representation observed in Scripture.

(b) Hale's Hist. of the Com. Law, p. 210.

[65]

This right of representation is not peculiar to the laws of *England*, but has prevailed by the laws of *other countries*; as may be seen in (b) Numb. chap. xxvi. ver. 33. and chap. xxxvi. For tho' by the *Jewish law*, the males inherited exclusively of the females, and the eldest son had a double portion of his father's estate, which was confined to him as the first begotten, yet we find when *Zelophehad* the son of *Hephir* died, leaving no sons, but *daughters*, and the daughters came unto *Moses* claiming the possession of their father, this being a new case, *Moses* is said to have brought their cause before the Lord, who commanded him to give them the possession of their father; so that it was here determined, that they should take the double portion that belonged to their father, as the eldest son *by right of representation*. So is *Selden de successionibus apud Hebræos*, cap. 23.

The same law was part of the twelve tables, and from thence came to be observed among the *Romans*; and here in *England* the right of representation holds as well in case of inheritances descendible by custom, as by the common law. So in the case of *gavelkind* lands, where the custom in pleading is thus set out; (Rast. Cust. 143. a.) *quod terræ et tenementa de tenurâ de* gavelkind *de tempore, &c. inter hæredes masculos partibilia, et partita fuerunt*; and yet, if a man seised of *gavelkind* lands, has issue three sons, one of which dies in the life of his father, leaving issue a daughter, and afterwards the father dies, there can be no doubt, but that this daughter shall inherit the purparty of her father, tho' she be not within the *words* of the custom, (*scil.*) that the lands are partible *inter hæredes masculos*; but the custom by construction, shall extend to daughters, *jure repræsentationis*. And there is no difference between the custom of *gavelkind* and this of *Borough-English*, only in respect of the quantity of the land which the heir takes; there each

In case of gavelkind lands, if one of the sons die in the life of the father, leaving a daughter, and after the father die, the daughter shall have her father's share.

son taking an equal part, but here the youngest takes the whole, which will not vary the reason in construction of the custom.

[66]

The common law takes notice of these customs of *gavelkind* and *Borough-English:* and there is a very remarkable case adjudged in Lord *Bridgman*'s time, which is not reported in any printed book; it was in the years 1660, 1661, *Intrat': Hill.* 1655. Rot. 779. C. B. *inter* (*a*) Hale *and*——, where the case was, that the copyhold lands of every tenant *dying seised,* were by the custom of the manor descendible to the youngest son, and a surrender was made to the use of *B.* and his heirs, who died *before admittance:* it was agreed, if *B.* had been admitted, the youngest son, after his death, should have inherited; but in regard *B.* died before admittance, the question was between the eldest and youngest son of *B.* who should have the land? and adjudged, that in this case, the *eldest son* should have the land, because of the *straitness* of the custom, and there never having been any seisin in the ancestor; but, by *my report* it would have been *otherwise,* had it been alledged that the lands were in the nature of *Borough-English,* which it was not, but only set forth as a particular custom; for the law takes notice of the custom of *Borough-English,* but not of this special custom; which is likewise the reason, why in pleading that lands are of the nature of *Borough-English,* you need not set forth the nature of the custom specially.

The custom is, that the copyhold lands of any tenant dying seised shall descend to his youngest son, and a surrender is made of a copyhold to the use of *J. S.* and his heirs, who dies before admittance, his eldest son, and not his youngest, shall take these lands; secus if the land had been laid to have been of the nature of Borough-English.

(*a*) This seems to be the same case that is cited in 2 Keb. 158, 159, under the name of Pain v. Herbert.

This case seems at first to be *against* me; but the *reason* of the distinction there taken is on *my side;* in the present case, the finding of the custom does not exclude the daughter, but on the contrary expressly comprehends her; for it is found, that the lands are descendible to the youngest son and *his heirs;* tho' without that express mention of his heirs the daughter should have inherited. Now this custom is not to be taken strictly, and according to the letter, but shall receive such construction as may comprehend necessary consequences and incidents in course of descents; and therefore, tho' the father be *disseised* and die, so that he is not seised at the time of his death, yet the right of entry shall descend to his youngest son; and tho' the son die before any entry, yet without doubt, the right will go to the daughter, notwithstanding the son could not be said to have *died seised,* within the words of the custom.

[67]

One seised of Borough-English lands is afterwards disseised, yet the right to the lands shall descend to the youngest son.

So in this case, if a descent be cast, the youngest son shall have his age, as much as if he were heir at common law, and there is no reason why the representative of the youngest son,

CLEMENTS v. SCUDAMORE.

(*viz.*) the daughter, should not be included within the meaning of the custom.

In the case of *Reeve* v. *Malster*, 1 Rol. Abr. 624. pl. 1. 1 Jones 361. Cro. Car. 410. The custom of the manor was, that if any person died seised *in fee simple* of lands within the manor, the same should descend *filio juniori hujusmodi tenentis customarii sic obientis seisiti, secundum naturam de* Borough-English; and a tenant of the manor being seised in fee, surrendered his lands to the use of himself and his wife, and his heirs; afterwards he had issue three sons, and died so seised *of the reversion*, and afterwards the youngest son died in the life-time of the mother without issue, and then the mother died: upon which the question being, whether the *eldest* or *middle* son should inherit? the judges were thereupon divided. *Barkeley* and *Bramston* held, that the *middle* son ought to have the land; but *Jones* and *Crook* were of opinion for the *eldest*.

Now I observe, that there the custom was more *special* than in our case, it not being, that if a man died seised *generally*, the lands should descend to his youngest son; but if he died seised
[68 *specially*, (*scil.*) in *fee simple*. Tho' in that case *Jones* and *Crook* declared it as their opinion, that if the father had been disseised and died, the youngest son should not have inherited; which makes it seem less strange, that they should exclude the middle son when the custom was so special; for the father did not die seised of the *fee-simple*, but of the *reversion*. But let that case remain undecided, the custom there differs from ours.

It was objected by Mr. *Weld* (who argued on the part of the defendant), that whoever takes by descent must make himself heir to him who was last seised; and the daughter cannot make herself heir to the grandfather.

But, in answer to that, it must be here intended, that she is to make herself heir to him who was last seised *according to the custom;* and if the custom extends to her, she is then heir to her father or grandfather last seised; and as the daughter of the eldest son at common law, *jure repræsentationis*, makes herself heir to her grandfather, so the daughter of the youngest son here makes herself heir to her grandfather by the custom.

The case of *Godfrey* v. *Bullock*, 1 Rol. Abr. 623. pl. 3. is a full authority for me: there the custom was, that, if a man died without heir male, his eldest daughter should have his lands; and the tenant had no heir male, but had issue several daughters, the eldest of whom had issue a daughter,

and died in the life-time of her father; adjudged this grand-daughter was within the custom, and should have the lands by descent upon the death of the grandfather. Now, by the common law, the eldest daughter has not the preference before the rest, but all inherit equally; yet custom may give the inheritance to the eldest daughter, and then her issue shall take it *jure repræsentationis*. This is as strong as a descent in *Borough-English*.

[69]

But the case of Sir *John Savage*, 2 Leon. 109. 208. is objected; and there the custom was, that if a man took to wife a customary tenant of the manor, and had issue, and overlived her, he should be tenant by the curtesy; and one married a woman to whom a customary tenement did descend during the coverture, and had issue, and survived her; yet it was adjudged, that he should *not* be tenant by the curtesy, because the woman was not a customary tenant at *the time of the marriage*, and so not within the custom, which (says the book) was to be taken *strictly*.

Now admitting that case to be law, it doth not affect ours; for there is a *particular* custom giving the estate to the husband, under *particular qualifications:* here the custom alters the descent by the common law to the eldest son, and carries it to the youngest son *generally*, and must have all the consequences of a descent; only with the difference as to the person. This exposition of the custom will tend to quiet and settle estates and titles, by introducing the same uniform rules of descent in all cases; whereas if *Jones* and *Croke*'s opinion were to prevail, it could not but occasion *uncertainty* and consequently *confusion*.

Judgment for the plaintiff *per tot' cur'*.

Memorandum. Upon the first argument, both *Holt*, C. J. and *Powel*, J. denied Sir *John Savage*'s case to be law.

CASE 14.

IDLE *versus* COOK.

Salk. 620. 2 Ld. Ray. 1144. 3 Danv. Abr. 186. Surrender of a copyhold to the use of baron and feme for their lives, et hæredum et assignatorum of the said baron and feme, and for default of such issue, to the right heirs of the surrenderor. This is an estate in fee, and not an intail in the baron and feme; otherwise had it been the case of a will. (1)

IN ejectment, on a long special verdict, the case was but this: *Zachariah Cliff* was seised in fee of the lands in question, being copyhold lands, and surrendered the same *ad opus et usum prædict' Zachariæ* for his life; and after his decease, to the use of *Valentine Cliff* his eldest son, and *Alice* his wife, *pro et durante termino vitarum suarum, et hæredum et assignatorum prædictorum Valentini et Aliciæ, et pro defectu talis exitus,* to the use of the right heirs of *Zachariah* for ever.

F. W. R. 704.

Not long after, *Zachariah* was admitted and died; and the question was, whether this estate limited to *Valentine,* and *Alice* his wife, was an *estate-tail* only, or a *fee-simple?* If a fee-simple, then judgment was to be given for the defendant: accordingly judgment was given for the defendant by three judges against *Gould,* J. the case having been thrice argued, and the court for some time divided.

[71] *Gould,* J. I am of opinion, that the estate limited to *Valentine* and *Alice* is a *fee-tail.*

(a) Moore 424. Cro. Eliz. 478.

The resolution in the case of *Abraham* (*a*) v. *Twigg,* cited in *Beresford*'s case, 7 Co. 41. b. which seemed at first to be against me, was the only matter that stuck with me; but I shall shew wherein that differs from the present case; I am sure I have the intention of the surrenderor on my side. It must be agreed, that the words [*de corpore*] are not precisely necessary to the creation of an estate-tail; it is sufficient that there are other words tantamount; and I agree, that there is no difference, in point of construction, between limitations of estates out of freehold and copyhold lands. In this limitation here is the word [heirs] and it is further explained *what heirs* are meant (*scil.*) of *Valentine* and *Alice*; and though the words be in the *genitive* case (*scil.*) *hæredum prædictorum Valentini et*

(1) Vide *Morgan* v. *Griffith,* Cowp. 234. *Denn* v. *Shenton,* Cowp. 410.

Aliciæ yet they import the same as if they had been limited in the *ablative* case, with the preposition *de*, (*viz.*) *hæredum* de *prædict' Valentino et Aliciâ*; and then the last words ascertain what heirs, (*scil.*) such issue of *Valentine* and *Alice*.

The resolution of *Beresford*'s case is very strong for me; and that limitation, upon comparison, has no more words in it than are in our case; the words [such issue] restrain it to the heirs of *their two bodies*, and do not extend to the heirs of the survivor. *Beck*'s case in Littleton's Reports 159. 253. 285. 315. and also reported in Cro. Car. 363, 364. by the name of *Boreton* v. *Nichols et al'*, is an authority in point for me; for the question there was, whether the limitation was an estate-tail, or a contingent fee-simple? and it was held an estate-tail; for if it had been a contingent fee, the remainder over had been void.

As to the case of *Abraham* v. *Twigg*, the limitation there [72
is not like ours; because there it is to the use of *Gabriel Dormer* and his heirs males; not to the use of *Gabriel Dormer* and the heirs males of *Gabriel Dormer*, aforesaid, as it is in our case, (*scil.*) and of the heirs and assigns of the aforesaid *Valentine* and *Alice*, as the difference is agreed in Littleton's Reports 347. It is held in Plowd. 541. a. if a man make a feoffment to another, to have and to hold to him and his heirs *et si contingat* that the feoffee die without *heirs of his body*, that then the lands shall revert, the feoffee takes only an estate-tail, the generality of the gift being corrected by the subsequent clause; so is the 19 H. 6. 74.

It is objected, that the word [assigns] imports a fee-simple, because an estate-tail is *not assignable*; and the subsequent words shall not control the express limitation.

Resp. The expression of [assigns] does not alter the sense of the limitation; for a man's assigns are included in himself, and implied in the limitation to the surrenderees before; also the same word [assigns] is to be found in *Canon*'s case, 3 Leon. 5. and yet that was adjudged but an estate-tail.

Powis, J. I am of opinion, that the estate is a *fee-simple* in *Valentine* and *Alice*.

It is a constant rule, that, in every creation of an estate-tail, it must appear of *what body* the persons who are to inherit, must issue. This is of the essence of the estate, 1 Inst. 27. and therefore if a man give lands to another, to hold to him and his *heirs male*, the donee takes a *fee-simple*, because it is not limited by the gift, of what *body* the issue male must be; [73]
whereas those words in a devise carry an estate-tail, because

IDLE v. COOK. of the intent; but in a conveyance at common law, as this is, the donor must, by express words, give direction from whose body the heirs inheritable are to issue. Litt. sect. 31. 1 Inst. 27, 28. 27 H. 8. 27. Hob. 32. 9 H. 6. 35. A gift to a man *et hæredibus de carne sua*, is an estate-tail, 33 Assize, pl. 15. for the words [*de corpore*] are not so strictly required, but that they may be exprest by words tantamount: and the example which the statute of *Westminster* puts hath not these words [*de corpore suo,*] 1 Inst. 20. b. but the words [*de*] or [*ex*] are absolutely necessary to make an estate-tail. 5 H. 5. 6. 3 *Ed.* 3. 743.

The resolution in *Beresford*'s case turned upon the word [*de.*] In our case the limitation appears at first in *Latin* ready to our hands in the *genitive* case; but in *Abraham* and *Twigg*'s case, it was in *English*, and afterwards turned into *Latin*; and that case was adjudged upon great deliberation; yet ours is much stronger to pass a fee-simple.

But it is objected, that the words [such issue] in the subsequent clause import *issue of* both *Valentine* and *Alice*.

Resp. Suppose that to be so, it still omits of what *body* that issue is to come, which is the principal thing; for upon the first clause, the heirs of the survivor take the whole; and *they* are such issue, and so it remains uncertain of whose body the issue inheritable is to come. It would have been otherwise if the words had been [and for want of issue of the survivor, *&c.*] But here the words are as general as can be; it was, indeed, the intent of the surrenderor in this case to give *Valentine* and
[74] *Alice* only an estate-tail, but then he ought to have made use of proper words; and there is no difference in construction between copyhold (*a*) and freehold lands, as is agreed in the case of *Seagood* v. *Hone*, Cro. Car. 367.

(*a*) See ante, Fisher v. Wigg, 14.

But it is objected, that *voluntas donatoris* ought to be observed; and here is a remainder limited over.

As to that, the will of the donor to be observed, ought to be in *charta sua manifestè expressa*, which is not so here: but this point has been already determined in the case of *Harrington* v. *Smith*, 2 Sid. 41. 73, 74. which is our case *in terminis*, and upon a surrender too; and although it be not mentioned in the book whether any opinion was given, yet by the note which I have of that case, it was then held to be a fee-simple. It will be of dangerous consequence to allow a greater latitude in limitations of estates-tail than has heretofore been done.

Powel, J. I am of opinion that the estate limited to *Valentine* and *Alice* is a fee-simple.

The objection is, that it appears to have been the surrenderor's intent to pass only an estate-tail. But upon great consideration, I cannot persuade myself to comply with that intent, without doing a greater injury, by confounding the nature of estates, and setting no bounds to limitations; so that it will never be known what is an estate-tail, and what a fee-simple.

A fee-tail was a fee-simple (*b*) at common law; for there were three sorts of fee-simples, absolute, qualified, (which was as to time only, *scil.* as long * as such a tree stood, or as *J. S.* had heirs of his body;) and also fee-simple conditional, which was limited as to the heirs inheritable; for it was not a fee accruing upon performance of a condition, (the donee having an immediate inheritance, though it is true he had a greater power over the estate upon the condition performed,) but upon such performance of the condition, he had not an estate descendible in any other manner than before; no body could inherit, but such heir as was within the limitation: but in regard some were of opinion, that at common law, the second husband should be tenant by the curtesy, and the issue by him inheritable, when the estate was originally limited only to the first husband and wife, and the issue between them; therefore to damn this opinion was the statute *de donis* made; upon which statute the judges, by construction, have made two estates out of the fee simple conditional at common law.

(*b*) For which reason no remainder could have been limited upon it. See post. Hayter v. Rod, p. 366.

[*75]

The construction of limitations must be the same upon surrenders (*z*) as upon deeds; and though it be otherwise in wills, yet even in these, notwithstanding the words [heirs of his body] were not necessary at common law; there always ought, however, to be some restraint of the general word [heirs] to make an estate-tail, as appears in the case of (*a*) *Herne* v. *Allen*, Cro. Car. 57.; for there the limitation over could not possibly take effect, if the devise were not meant of heirs special.

(*a*) Ante, Nottingham v. Jennings, 24.

Now are here any words of restriction to an heir special? None, that are so restrictive as to shew an apparent intent in the surrenderor, that only the issue between *Valentine* and *Alice* should inherit, any more than there were in *Abraham* and *Twigg*'s case, which in my apprehension does not differ from this.

I do not understand my brother *Gould*'s diversity; I think *the heirs of them* and *their heirs* are the same, and the words

(*z*) *Lovell* v. *Lovell*, 3 Atk. 11.

IDLE *v.* COOK. [*such issue*] are of no service; for they are uncertain, and do not determine of whose body; and the heirs general, in the first part of the limitation, are such issue, but if the words had been [*for want of issue of them,*] it might have been an estate-tail, but all heirs are issue of some body.

We have gone too far already, in helping the intention of the parties in construction of limitations; and have made estates so uncertain, that lawyers do not know how to advise purchasers; I cannot consent to carry it any further; *Beck*'s case differs from this, and it was not necessary, or material in that case to determine, whether the estate limited were a fee-simple or a fee-tail; for if the remainder was contingent, that was sufficient, and in the mean time, the remainder *in esse* was executed, and the contingent remainder never happened; but there were more special words in that case, *scil.* [heirs male of his body,] and, although the limitation to the first son of *James Beck* which should have heirs males, *&c.* was only a description of the person, yet the words [*such issue*] might likewise well enough refer to the words [*heirs males*], which may help the resolution; but here are only general words, and nothing special to refer such issue unto. The case of *Harrington* and *Smith* cited by my brother *Powis* is the case in point.

Holt, C. J. I am of opinion, that as the words of this limitation are, the estate limited to *Valentine* and *Alice* is a fee-simple; and that as they stand originally upon the surrender in *Latin,* they cannot be construed to make an estate-tail.

[77]

I am satisfied, that it was the surrenderor's intent to give *Valentine* and *Alice* only an estate-tail; for which reason, I would willingly have construed it so; but could not make such a construction consistently with reason, or any rules of law. The construction of this surrender must be the same, as if the estate had been limited by feoffment, or any other deed, and must be alike governed by the same rules of the common law.

It is necessary, upon the creation of every estate-tail, that it be expressed in certain of what body the heirs inheritable should issue. Lit. sect. 31. 1 Inst. 27. In a gift of lands to another to hold to him and to his heirs male, the word [*male*] was rejected, and the word [*heirs*] stood in the limitation to make a fee simple; for that it could not be an intail, there being no limitation by the gift, of what body such issue should be; and yet in that case it was impossible to doubt, but that the intention of the donor was to make an estate-tail; not-

withstanding which it was held to be a fee-simple, and Lord *Coke* very positive in his opinion. IDLE v. COOK.

In the present case, here is no certainty of whose body the heir shall be; and the words are sufficient to carry a fee-simple; indeed in a will such words would make an estate-tail; purely upon the intent of the devisor; but there is a great difference betwixt a will, and a conveyance at common law, as this is; for the law has appointed proper words to be made use of in limitations of estates in *deeds*, as the word [*heir*] to carry a fee-simple, and no other word tantamount or equivalent will be admitted; whereas in a *will* it is otherwise; for that is a new conveyance by force of the statute of 32 H. 8. [78] which says, it shall be lawful for a man to dispose of his lands *by will, at his will and pleasure*; and this is the reason, why a devise to a man *in perpetuum* passes a fee-simple, at the same time that these words in a deed give only an estate for life.

In this limitation, we have no restrictive words to turn the estate, that by force of the first words is a fee-simple, into an estate tail; indeed, if it had been said, *if* Valentine *and* Alice *die without issue of their bodies*, that, being express and particular, would have made it an estate-tail; but as it now stands, the first words carry a fee-simple, and the latter, being consistent with them, make no alteration in the estate. In the case of 5 H. 5. 6. and H. 6. the limitations are certain and express of whose body.

But it is objected, that an estate-tail may arise by implication, as in Perk. sect. 173.

I agree that case to be law, for the words are express, but they are not so here; for in our case the words [*such issue*] import heirs general, for there is no heir but is the issue of some body; so that is only a limitation of one fee-simple upon another. If lands are given to a bastard and his heirs, he takes a fee-simple; and a limitation of a remainder over upon such gift would be void; and yet the lands cannot descend upon any other but his (*a*) issue. But no limitation of an estate by (*b*) implication shall controul a precedent limitation that is express; as is agreed in the case of *Seagood* v. *Hone*, Cro. Car. 367. 1 Jones 342. And here the estate in fee-simple is an express estate; whereas* the estate-tail which it is insisted should control it, arises but by implication.

If lands are given to a bastard, and his heirs, though such bastard can have no other heir but such as is his issue; yet it is a fee-simple. (*a*) 1 Inst. 3. b. (*b*) Ante Bamfield v. Popham, 56. and post. Humberston v. Humberston, 333. and Tomlinson v. Dighton, 154.

[*79]

The case of *Abraham* and *Twigg* is so strong as not to be answered, and does not in the least differ from the present case;

IDLE v. COOK. for that was adjudged a fee-simple, for want of proper words to describe of what body the issue should be. There is a difference betwixt a limitation in the genitive, and one in the ablative case, as is held in *Beresford*'s case; for the word [*de*] is made use of in the statute of Westm. 2. And if an estate be limited to a man and the heirs male of his body, it must be translated *de corpore suo*; so if it be said of any one, he was born of such a father, that, in *Latin*, would be *genitus de tali patre*. 1 Inst. 20. b. In *Abraham* and *Twigg*'s case the limitation was in the genitive case, (*scil.*) *and of his heirs male.*

As to the case of *Boreton* v. *Nicholls*, Cro. Car. 363. reported also in *Littleton* 159. the words [*such issue*] must there be taken to be issue male of the body of *James* mentioned before, and the resolution of that case doth not affect ours; there I admit it is a contingent estate, but yet it might be a contingent estate-tail. If we should make this an estate-tail, it would be repugnant to the words in the first part of the limitation, which being to *Valentine* and *Alice*, their heirs and *assigns*, shews the intention of the surrenderor to have been, that they should have an assignable estate; and then for us, by construction, to make this an estate-tail, which is unassignable, would be contrary to the institution of the statute *de donis*. But it is

Objected, in answer to this, that the word [*assigns*] is void, they being implied, and included in the donee himself, and *expressio eorum quæ, &c.*

[80] *Resp.* That rule must be intended, where the sentence is one intire sentence; but still those words, which, as to that sentence, are surplusage and void, may, notwithstanding, influence a subsequent sentence; as in Hob. 170. Dyer 264. b. if I grant my house and my shop, the word [*shop*] is void, because it passes as part of my house; but yet, in respect of subsequent words, it may have a signification: as if I grant my house and shop, excepting my shop, here the express grant of my shop has such a signification, and is of such effect, as to make the exception of the shop void, it being before expressly granted.

DE TERM. S. MICHAELIS, 1705.

FELLOWS *versus* MITCHELL *and* OWEN.

CASE 15.

LORD KEEPER COWPER.
2 Vern. 504. 515.

Two trustees in a mortgage join in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the mortgage-money; to be answerable only for what they respectively receive.

TWO trustees in a mortgage for 2000*l.* join in an assignment of the term, and in an acquittance for the money and each receives a moiety; after which one proves insolvent; the question was, Whether the other trustee should be chargeable with the whole.

To prove that each trustee should answer for no more money than he had himself received were cited Cro. Car. 312. *Townley* v. *Chalenor*, and *Bridgman* 35. the same case; also *Heaton* v. *Mariot, in Canc'* on exceptions, 31 *Oct.* 13 *Will.* 3. reheard *Jan.* 27. 1 *Annæ Reg'*; and lately in chancery the case of *Woodcock* and *Widdall*, who were trustees by Mr. *Lyster*'s will, where *Widdall* received all; and tho' *Woodcock* joined in the sale to the purchaser, yet he was not charged.

Vernon cont'; Each trustee shall be liable for the whole. The case of *Foster* v. *Townley* was only, that one trustee should not be charged where he had not joined in receipts with the other. In *Woodcock*'s case, the trustee whom the party would have charged, joined in the conveyance, but not in the receipt of the consideration-money indorsed. In *Allen* and *Wilken*'s case, last *Lent* vacation, both trustees were charged with each other's receipts.

[82]

Freeman, on the same side, cited the case of *Murrell* v. *Pitt*, (1) at the Rolls last *Hillary* term, where two executors trustees joined in a transfer of *East-India* stock, and received in moieties; and on one's proving insolvent, the other was charged with the whole.

(1) And afterwards affirmed on an appeal, 2 Vern. 570.

FELLOWS *v.* MITCHELL *and* OWEN.

Also the case of *Widmore* (1) v. *Bond*, twice heard before Lord *Somers*; two executors died leaving each an executor; decreed, at first, that they should be answerable only respectively for the receipts of their several testators; but upon a re-hearing, the court charged each with the whole.

Cur': This is a case (2) of difficulty; the last Lord Keeper took time about it.

It is attended with circumstances somewhat uncommon; for the *cestui que trust* has admitted, that he was present and consenting to the payment of the money in moieties, and that at his importunity the trustees joined in an acquittance for the whole.

The case of *Heaton* v. *Marriot* is an express authority for the trustee, that he should be only chargeable for his own receipts.

[83] It may be reasonable, where upon the proof it cannot be distinguished, how much was received by the one trustee, and

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(1) *Widnall* v. *Bond*. Reg. Lib. B. 1693, fol. 690, and 1694. fol. 252. What appears of this case in the register's book is as follows. *Thomas Fulshurst* had devised his real and personal estate to *Lem* and *Richards* upon several trusts, and to pay the residue to plaintiffs, and appointed *Lem* and *Richards* executors. The original bill was filed against *Lem* and *Richards* for an account of the personal estate and the produce of a copyhold estate which they had sold. — Before answer, *Lem* and *Richards* both died. — *Lem* left *Mary Bond*, an infant, his executrix. — *Richards* left *Sarah Richards* his executrix. — The executrixes by their answer to the bill of revivor (after stating the personal estate of *Fulshurst*, to be very inconsiderable) admitted that *Lem* and *Richards* had sold the copyhold estate for 1300*l.* and upwards (without stating to whom particularly the purchase money was paid) but insisted that they had accounted for the whole to the plaintiffs. They then admitted assets of their respective testators. — No evidence appears to have been read on the hearing. — Decree, that defendant *Bond* should account for and pay the real and personal estate of *Fulshurst* possessed by *Lem* in his life-time, or by her the defendant, since his death, and that the defendant *Sarah Richards* should account for and pay what was received by *Richards* in his life-time, or by her the said defendant since his death. — The petition of re-hearing preferred by the plaintiffs complained, "that, *Lem* and *Richards* having received the money jointly, they ought to be jointly answerable to the plaintiffs, the plaintiffs not being able to prove how they divided such money, nor ought they to be involved in any examination or account touching that matter, but that as the decretal order was drawn, each defendant was only charged with what was received by her own testator." — Whereupon it was ordered, "that the said defendants should come to a general account for what their testators received out of *Thomas Fulshurst*'s estate, and if the Master in taking such account should find any difficulty, he was to report the same specially to the court." And the deposit was to be returned to the plaintiffs.

(2) The bill was filed by one trustee against the other and the *cestui que trust*, to be discharged from the trust upon payment of what he had actually received; and it was so decreed. Reg. Lib. A. 1705. fol. 171.

how much by the other, to charge each with the whole. For in such case the trustees are to blame for not keeping distinct accounts. It is like one throwing corn or money into another's heap, where there is no reason that he who made this difficulty should have the whole: on the contrary, because it cannot be distinguished, he shall have no part.

FELLOWS *v.* MITCHELL *and* OWEN. See Pre. Cha. 87.

In *Murrell* and *Pitt*'s case, it was a voluntary act in them, being executors, to sell the *East-India* stock; but here, what the trustees did, was necessary for the satisfaction of the mortgagee.

Otherwise where executors join in sales, there being no necessity for their so doing.

It seems to be *substantial* injustice, to decree a man to answer for money which he did not receive, at the same time that the charge upon him by his joining in the receipts, is but *notional*. Wherefore let (*a*) each trustee be discharged of the trust, by answering for so much only as he has actually received. (1)

(*a*) See post. 241. the case of Churchill v. Hopson, and 1 Salk. 318. where the like opinion is delivered by Lord Harcourt.

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(1) The distinction between executors and trustees as to this point appears also in *Applyn* v. *Brewer*, Pre. Cha. 173. *Attorney General* v. *Randall*, 21 Vin. Abr. 534. pl. 9. *Ex parte Belchier*, Amb. 219. *Leigh* v. *Barry*, 3 Atk. 584. In *Westley* v. *Clarke*, (*z*) which came on before Lord *Northington* on the 25th of *June*, 1759, his Lordship expressed his disapprobation of this distinction between executors and trustees. The case was this: *M. Smith* by his will, gave the two plaintiffs, legacies of 300*l.* and 100*l.*, and the residue of his personal estate to his widow, and appointed *Clarke*, *Betts*, and *Thompson*, his executors, with a clause that one of his executors should not be answerable for the acts of the others. The testator died on 22d of *June*, 1755. Part of his estate, to the amount of 600*l.* was, at the time of his death, out on mortgage. *Thompson*, (who was an attorney) after the testator's death, called in the mortgage and received the money, and afterwards sent his clerk with the assignment of the mortgage to his two co-executors, who executed the same, and signed the receipt indorsed thereon. *Thompson* became a bankrupt on 27th *July*, 1756, without having accounted for this money, and the plaintiffs, the legatees filed this bill to charge *Clarke* and *Betts* with this money received by *Thompson*. It was in proof in the cause that *Thompson* was much in the confidence of the testator in his life-time, and acted as his attorney; that *Thompson* continued in good credit till about five weeks before his bankruptcy, and that the 600*l.* were paid to him long before that time. On the hearing of the cause the several cases above-mentioned were cited. Lord *Northington*, "This "claim is founded on the notion of a "general rule having been established "in this court, that where executors "join in a receipt, they themselves are "all liable *in solido*, because their join- "ing is unnecessary, and that a different "rule has been established with respect "to trustees who join in receipts, namely, "that they are not answerable *in solido*, "but in proportion only to what they "receive. But in my opinion this dis- "tinction does not seem to have been "taken with that precision which is "necessary to form or establish a gene- "ral rule; for where trustees join in a "receipt, that may of itself be such an

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(*z*) 1 Eden, 357. And see *Harden* v. *Parsons*, 1 Eden, 147.

4. Tu. 46. 39.
1910. 1. Ch. 33 x.

CASE 16.

ELLIOTT *versus* DAVENPORT.

LORD KEEPER.
2 Vern. 521.
1 Eq. Ca. Abr. 296. pl. 1.
2 Eq. Ca. Abr. 540. pl. 4.
A. devises to *B.* 400*l.* which he owed him, provided he should thereout pay several sums to his children; the rest be freely gives him, and directs his executors to deliver up the security, and not to claim any part of the debts, but to give such release as *B.* his executors, &c. should require; *B.* dies in the life of *A.* : decreed this was a lapsed legacy.

SIR *William Elliott* was indebted unto *Anne Davenport* in 400*l.* by recognisance, and afterwards *Anne Davenport* by her will gave and bequeathed unto Sir *William Elliot*, his executors, administrators and assigns the sum of 400*l.* which he owed her, together with all interest due for the same, provided that he the said Sir *William Elliott* should pay, out of the said 400*l.* the several legacies therein after mentioned, to his

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"evidence of payment of money to them "jointly, as will be sufficient to charge "each *in solido*, until other evidence "appear to the contrary; as, on the "other hand, the general receipt of exe- "cutors may be so far rebutted by other "circumstances (as in *Churchill* v. "*Hopson*,) as to make him only, who "actually received, liable. The case of "*Churchill* v. *Hopson*, being a parti- "cular case grounded on circumstances, "does not furnish any general rule. A "joint receipt given by executors is only "a stronger proof of their having all re- "ceived the money than that of a joint "receipt given by trustees, because it "is not necessary for conformity that all "the executors should join in giving a "receipt, whereas it is otherwise with "trustees. But I do not see any ground "for a court of conscience to say, 'I "will make you liable for the whole mo- "ney although you never received a far- "thing of it, merely because you have "joined in a formal receipt.' The re- "ceiving the money and the signing the "receipt are separate and distinct acts, "the latter being only (as far as it goes) "evidence of the former. The equity "in this case is so obvious that it will "weigh with me, (if there are no direct "precedents to the contrary,) against "any arbitrary rule laid down in any "age. This case is strengthened by "the proviso in the will, that one exe- "cutor shall not be answerable for the "acts of the other, which, although "usual in settlements, is not so frequent "in wills, but is a good proviso between "executors and legatees who take under "the same will. The material part of "this transaction is the receiving the "money, which was by *Thompson* only, "the other, signing the receipt, is only "the form. I am, therefore, of opinion "and declare, that the defendants "*Clarke* and *Betts*, are not liable to "make good the sum of 600*l.* (no part "of which came to their hands) the same "having been received by *A. C. Thomp- "son* the bankrupt." *N. B.* This de- cree appears only in the Register's minute book; and as to the grounds of it, see more in *Churchill* v. *Hobson*, post. 241. *Et vide Sadler* v. *Hobbs*, 2 Bro. C. C. 114. *Scurfield* v. *Howes*, 3 Bro. C. C. 90. — And in *Ex parte Singleton*, in *Linc. Inn Hall*, *Aug.* 10, 1791, Lord Chancellor refused to charge the surviving assignee of the bankrupt, with money received by his co-assignee, although they had joined in the receipt, and although they had before agreed to pay the money to be from time to time received by them into the hands of a banker for safe custody; and his Lordship expressly took the above-mentioned distinction between executors and trustees.

children, (amounting to about 150*l.*) and the residue of the said 400*l.* she gave to the said Sir *William Elliott*, his executors, administrators and assigns; and by her said will desired and appointed her executors not, by any means, to claim or meddle with the said 400*l.* but that they should freely deliver up the security for the same, into the hands of the said Sir *William Elliott*, his executors, administrators, and assigns, and seal and execute unto the said Sir *William Elliott*, *&c.* all such reasonable releases and discharges, and acknowledge satisfaction for the said 400*l.* for the safety of Sir *William Elliott*, *&c.* as the said Sir *William Elliott*, *&c.* should think fit.

Sir *William Elliott* died in the life-time of the testatrix; after which, the testatrix died, and *William Elliott* the heir of Sir *William* brought this bill against the executor of Mrs. *Davenport* in order to be discharged of this recognizance.

Upon which the question was, concerning so much of the 400*l.* as was to remain to Sir *William*, after payment of the legacies to his children, whether that was not a lapsed legacy, by reason of the death of Sir *William* before the testatrix?

1*st*. It was agreed by the court, and likewise by the counsel on both sides, that where one gives a legacy to a man, his executors, administrators and assigns, if in such case, the legatee dies in the life of the testator, tho' the executors are named, yet the legacy is lost; for the words [executors, administrators, and assigns,] are void, being but surplusage, *et expressio eorum*, *&c.* and they are, by supposition of law, named only to take in succession, and by way of representation as an heir represents the ancestor, in case of an inheritance; and to this purpose *Brett* and *Rigden*'s case was cited, Plowd. 340. Where [85] lands being devised to a man and his heirs, and the devisee dying in the life of the testator, it was held, that the devise was void, and the (*a*) heir could not take; consequently if the question here had depended upon this clause only, the legacy had been lost.

(*a*) To this purpose see more particularly the case of Goodright v. Wright, post. 397. (1)

2*dly*, It was held, that a will might be so penned, as that, tho' the legatee died in the life of the testator, yet his executors should have the legacy; but then it ought to appear in the will plainly, and by direct words, that this was the testa-

(1) Vide also *Hutton* v. *Simpson*, 2 Vern. 722. *Hodgson* v. *Ambrose*, Doug. 337. *Warner* v. *White*, Doug. 344. note 4. (*z*)

(*z*) S.C. 11 East, 551, note (*d*).

ELLIOT *v.* DAVENPORT.

tor's intention; and tho' a will could not (as was allowed) enure as a (*a*) release, even supposing it to be sealed and delivered, for want of its taking effect in the testator's life-time, yet, provided it were expressed to be the intention of the party, that this debt should be discharged, the will would operate accordingly. (*z*)

(*a*) 1 Vent. 39. & post. Sir Barnham Rider v. Sir Charles Wager, Vol. II. 332.

And therefore *Lord Keeper* said, that if this question had depended only upon the latter clause, (viz.) that this security should be delivered up to Sir *William Elliott*, his executors, administrators or assigns, in such case, it would be plainly an absolute discharge of the debt, tho' the testatrix had survived the legatee.

So that the question was reduced to this: Whether the latter clause was to be taken as distinct from, or independent of the former clause, in which case the legacy would subsist; or whether it ought to be looked upon as ancillary to, and dependent upon it, (*scil.*) if the legacy took effect, then and then only the executor, in consequence of it, was to release.

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And his Lordship decreed, (1) that this latter clause was dependant upon the former, and therefore, that the legacy being a lapsed legacy, upon the former clause, the latter did not prevent it. That what made such construction appear the more reasonable was, that the like clause, in much the same words, was added to the other legacies given by the same will, which could not operate by way of release or extinguishment; and tho' it might be the intent of the testatrix, that the executors of the legatee should have the benefit of the legacy, (as probably this is always the intent where a legacy is given to a man, his executors, &c.) yet the law being otherwise, such intent (2) must not prevail: for which reason, a will that designs to prevent the lapsing of a legacy, by the death of the legatee in the life of the testator, ought to be specially penned.

A will that designs to prevent the lapsing of a legacy, by the

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(1) Reg. Lib. A. 1705, fo. 521. "His Lordship declared that the last "clause in the will (whereby it was di- "rected that the security should be de- "livered up to the said *William Elliot*, "his executors, administrators or as- "signs, and that no use should be made "thereof) was only in aid of the first "clause in the will, by which alone the "sum is to be taken as a lapsed legacy."

(2) Sed vide *Sibley* v. *Cook*, 3 Atk. 572.

(*z*) Vide *Eden* v. *Smyth*, 5 Ves. 341. *Brymer*, 6 Ves. 516. *Izon* v. *Butler*, *Aston* v. *Pye*, ib. 350, n. (*b*). *Reeves v.* 2 Price, 34.

death of the legatee in the life of the testator, ought to be specially penned. † ELLIOT v. DAVENPORT.

Note; The Master of the Rolls, who heard this cause the day before, but adjourned it over for the Lord Keeper's determination (before whom it had been in part first heard), was of another opinion. Lord Keeper also said it was a doubtful case. (1)

† An appeal was brought from this decree to the House of Lords, but before hearing, the parties agreed.

(1) Vide *Sibthorp* v. *Moxom*, 3 Atk. 580. which Lord *Hardwicke* distinguished from *Elliot* v. *Davenport*. (*z*)

(*z*) See also *Stone* v. *Evans*, 2 Atk. 86. *Toplis* v. *Baker*, 2 Cox, 118. *Maybank* v. *Brooks*, 1 Bro. C. C. 84. *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128. *Bridge* v. *Abbott*, 3 Bro. C. C. 224. *Wilmot* v. *Woodhouse*, 4 Bro. C. C. 227. *Maitland* v. *Adair*, 3 Ves. 231. *Corbyn* v. *French*, 4 Ves. 418. *Tidwell* v. *Ariel*, 3 Madd. 403. *Vaux* v. *Henderson*, 1 Jac. & W. 388.

DE TERM. PASCHÆ, 1706. [87]

1 Bea. 65.

LEGATE *versus* SEWELL.

CASE 17.

THIS case was by the Lord Keeper sent to the Judges of *C. B.* for their opinion, and was as follows: (1) 2 Vern. 551. Gilb. Chanc. 258. 1 Eq. Ca. Abr. 394. pl. 7. Devise to *A.* for life, and after his decease to the heirs male of the body of *A.* and the heirs male of the body of every such heir male, severally and successively, as they shall be in priority of birth, &c. remainder over; whether this be a tenancy in tail, or for life only?

(1) Reg. lib. B. 1705. fol. 296. The principal cases in which second words of limitation have been superadded on the first are *Archer*'s case, 1 Rep. 66. *Lisle* v. *Gray*, 2 Lev. 223. (*y*) *Backhouse* v. *Wells*, 1 Eq. Ca. Ab. 184. *Luddington* v. *Kime*, 1 Ld. Ray. 203. (*x*) *Law* v. *Davis*, 2 Ld. Ray. 1561. *Goodright* v. *Pullyn*, 2 Ld. Ray. 1437, & 2 Stra. 729. S. C. *Minshull* v. *Minshull*, 1 Atk. 411. *Allgood* v. *Withers*, (cited) 2 Burr. 1107. *Wright* v. *Pear-*

(*y*) T. Raym. 278, and 2 Jones, 114. S. C.

(*x*) 3 Lev. 431. & Salk. 224, S. C.

LEGATE v. SEWELL.

George Legate, seised of lands in fee, had a wife named *Elizabeth*; he had no issue of his body, but had a nephew named *William Legate*, being his deceased elder brother's son; he had likewise a brother named *Henry*.

In *September* 1685, this *George Legate* by his will, after many legacies therein given, devised his lands, in default of issue of his own body, unto his said nephew *William Legate*, for and during the term of his life, and after his decease to the heirs male of the body of his said nephew lawfully to be begotten, and the heirs male of the body of every such heir male severally and successively as they should be in priority of birth, &c. and for want of such issue, to his brother *Henry Legate*, for his life; and after his decease, to the heirs male of the body of his brother *Henry*, lawfully begotten, &c.

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Qu. Whether *William Legate* the nephew had an estate-tail vested in him, or an estate for life only in the lands to him devised?

William Peere Williams pro quer'.
William Melmoth pro def. Sewell & ux'.

May it please your Lordship,

The certificate of three of the judges of C. B. to the Lord Keeper on this point.

In pursuance of your Lordship's orders, the parties concerned have attended us with their counsel; and after hearing what was alledged by the counsel on both sides, and on consideration of the will of *George Legate*, we are humbly of opinion, that *William Legate* the nephew, by virtue of the said will of his uncle, had an estate-tail vested in him. This is submitted to your Lordship's great wisdom.

T. Trevor,
Jo. Blencow,
Rob. Dormer.

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son, Amb. 358. (*z*) *King* v. *Burchell*, Amb. 379. and 4 T. R. 296. note. S. C. (*y*) *Roe* v. *Grew*. 2 Wils. 322. *Doe* v. *Laming*, 2. Burr. 1100. *Doe* v. *Collis*, 4 T. R. 294. (*x*) See further as to the application of the rule in *Shelly*'s case in *Bale* v. *Coleman*, post. 142. *Attorney-General* v. *Sutton*, post. 766. *Papillon* v. *Voice*, post. Vol. II. 471. *Coulson* v. *Coulson*, 2 Atk. 246, 247. 250. *Bagshaw* v. *Spencer*, 1 Vez. 142. (*w*) *Garth* v. *Baldwin*, 2 Vez. 646. *Hodgson* v. *Ambrose*, Doug. 323. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

(*z*) Fearne Cont. Rem. 6 ed. 126. & 1 Eden, 119. S. C.

(*y*) 1 Eden. 424, S. C.

(*x*) *Denn* v. *Puckey*, 5 T. R. 299. *Goodtitle* v. *Herring*, 1 East, 264. *Doe* v. *Ironmonger*, 3 East, 533. *Frank* v. *Stovin*, ib. 548. *Crump* v. *Norwood*, 2 Marsh. 161, & 7 Taunt. 362. S. C.

(*w*) 2 Atk. 570. 5 Hill's MSS. 292, S. C.

LEGATE v. SEWELL.

The certificate of Mr. Justice Tracey.

I am humbly of opinion, that *William Legate* had only an estate for life by this devise; and that the words [heirs male of his body] as this case is, are words of purchase; for so the intent of the devisor seems apparently to be, by limiting the estate expressly to *William Legate* for his life, and by the limitation over to the heirs male of the body of every such heir male severally and successively, *&c.* which words must be wholly rejected as idle and void, if we make the former words [heirs male of the body of the said *William Legate*] to be words of limitation. And this construction is (I think) warranted by the case of (*a*) *Clark* v. *Day*, Cro. Eliz. 313. and by *Archer*'s case in 1 Co. 66. b.; for the reason of *Archer*'s case was, not that the devise was to the heir male of the tenant for life, in the singular number, (for if it had gone no farther, it had been an estate tail executed, the word [heir] being *nomen collectivum*, and the same with the word [heirs], and so it was resolved in the case of *Pawsey* v. *Lowdell*, 1 Roll. Abr. 626. and in the case of *Clark* v. *Day*, cited before); (1) but the reason why the heir male there took by purchase was, because the estate was limited over to the heirs male of the body of such heir male; and so is the opinion of the court in the case of *Pawsey* v. *Lowdell*; and of the Lord C. J. *Hale*, in the case of the *King* v. *Melling*, 1 Vent. 232.

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(*a*) See this case cited and stated at large, ante, p. 57.

And if that be all the reason of *Archer*'s case (and those are great opinions I have cited for it), then there is a direct authority for me in this case.

In the case of *Lisle* v. *Gray*, 2 Jones 114. 2 Lev. 223. where the limitations were to the same effect as here, it was held not to be an estate-tail executed in the father, who had an estate for life limited to him; and the court went upon the same reasons (among others) which I have relied upon in this case; and yet that was upon the construction of a *conveyance*, where (generally) the words shall be taken according to the legal sense, and their operation in law shall control the intent and meaning of the party: but we are in the case of a *will*, where the intent of the party shall control the legal sense and meaning of the words.

And it appears by the record of that case of *Lisle* and *Gray*, that the judgment of the court of *B. R.* was affirmed in the Ex-

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(1) Et vide *White* v. *Collins*, Com. Rep. 289. *Miller* v. *Seagrave*, Robinson on Gavelkind, 90. *Dubber* v. *Trollop*, Amb. 453. *Doe* v. *Laming* 2 Burr. 1110.

LEGATE v. SEWELL.

chequer-chamber, though the reports of the case differ in that matter. *Rob. Tracey.*

Memorandum. In this case the will of *George Legate* was of money directed thereby to be laid out by his executor in a purchase of lands, to be settled in manner and according to the limitations specified in the case above referred to the judges; and therefore the Lord Keeper directed the case to be made and laid before the Judges, supposing it to be land; for that money ordered to be laid out in the purchase of land, should be as land in equity.

And it was insisted upon by Mr. *Vernon*, that where money is ordered by a will to be laid out in land, and to be settled on *A.* in tail, remainder over to *B.* there the court has decreed the money to be paid to *A.* because it would be in vain to decree an estate-tail in the land, which he might cut off by a common recovery. Indeed, if *A.* were an infant, the court probably would not decree (*a*) the money to be paid to him; because during his infancy no recovery could be suffered, and *A.* might die before he came of age. And to this purpose was cited the case of Sir *Robert Carr*, decreed by Lord *Jeffreys*.

(*a*) Post. 471. Short v. Wood.

Sir *Thomas Powis, cont':* Why should not the remainder-man have the benefit of the chance of the tenant in tail's dying before a common recovery suffered? And for what purpose are recoveries kept up, but as so many *mediums* betwixt a rash and a deliberate act? Besides, the tenant in tail, though of age, may yet die in a vacation before a term, and so not have it in his power to suffer a recovery.

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Lord Keeper. If this were *res integra*, where a purchase is directed to be made, and the land to be settled on *A.* in tail, *&c.* it would be most reasonable for equity to decree the trust to be executed, and the estate-tail to be settled, with the remainder over; that so such remainder-man might have the benefit of the chance of tenant in tail's dying before his having suffered a common recovery.

The least right, and though of the least value, yet if it be a right, ought not to be taken from any man; but this matter seems not now open; and I would not break in upon former (*b*) resolutions.

(*b*) But the practice seems to have been since otherwise. (1)

(1) Vide *Short* v. *Wood*, post. 470. *Edwards* v. Countess of *Warwick*, Vol. II. 173. *Cunningham* v. *Moody*, 1 Vez. 176. *Trafford* v. *Boehm*, 3 Atk. 447. (*z*)

(*z*) *Benson* v. *Benson*, post. 130.

LEGATE *v.* SEWELL.

I agree, the case of (*a*) *Champernowne* v. *North*, *viz.* that a common recovery by *cestuy que trust* in tail shall bar the remainder as much as a recovery by tenant in tail of a legal estate (*z*); but whether only a deed executed by *cestuy que trust* in tail shall bar the remainder-man, or even the issue, that is with me a doubt; in regard a deed may be made at a tavern, or by surprise; but a recovery is a solemn and a deliberate act. (1)

(*a*) 2 Chanc. Ca. 78. 1 Vern. 13. 440. Bare articles, or a deed only executed by tenant in tail, in equity, seem hardly sufficient to bar the intail.

It seems, in this case there had been a decree long since obtained by *William Legate* the first devisee, against the executor of the testator, by which it was directed, that the executor, instead of laying out the money in a purchase, should pay it to *William Legate*, the first devisee. But *Henry Legate*, the devisee in remainder, not being party to this decree, it was held to be void as to him, and in no sort binding.

The court appearing afterwards not to be satisfied with the certificate of the three judges, directed that an ejectment should be brought in *B. R.* in order to have the matter settled: But it is said the parties agreed, and so the question was not determined. (2)

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(1) It has been now long settled, that the issue in tail is not barred without a recovery actually suffered. *Weale* v. *Lower*, (cited) 2 Vern. 306. *Kirkham* v. *Smith*, Amb. 518. *Salvin* v. *Thornton*. 1 Bro. C. C. 73. (*y*)

(2) Yet in 2 Vez. 657. Lord *Hardwicke* says, that in this case Lord *Cowper* held himself bound to agree with the three judges and so decreed. (*x*) In the Register's book there appears an order for setting down this cause on the judge's certificate, but the editor has not been able to find any farther proceedings.

(*z*) *Brydges* v. *Brydges*, 3 Ves. 120. *Ld. Grenville* v. *Blyth*, 16 Ves. 224. *Wykham* v. *Wykham*, 18 Ves. 395. *Ireson* v. *Pearman*, 3 B. & C. 799.

(*y*) *Radford* v. *Wilson*, 3 Atk. 815. *Fletcher* v. *Tollet*, 5 Ves. 13.

(*x*) But this court is not bound by the certificate of a court of law. *Prebble* v. *Boghurst*, 1 Swan. 320. And see *Trent* v. *Hanning*, 10 Ves. 495.

SIR GEORGE NEWLAND *and* BECKLEY, *Executors of* WATTS, *versus* ———.

CASE 18.

ONE seised of lands in fee owes a debt by statute, and afterwards becomes a bankrupt, and the creditor by statute extends the lands, then a commission of bankruptcy is sued out; 2 Eq. Ca. Abr. 116, pl. 1. See the case of Orlebar v. Fletcher and the Duke of Kent, post. 738. A creditor by statute of J. S. if J. S. become bankrupt, and the statute not sued and executed before the bankruptcy, shall come in only *pro rata*, though there were lands in fee bound by the statute. (*w*)

(*w*) *Stonehewer* v. *Thompson*, 2 Atk. 440.

NEWLAND *v.*

and whether the land should be liable to the statute-creditor? was the question.

Upon importunity of counsel, Lord Chancellor referred this to the judges of *C. B.* before whom it was insisted by Serjeant *Pratt* and myself, that the lands were actually bound by the statute; and the creditor relying on this security, it would be hard that the doubtful words of the stat. 21 Jac. 1. cap. 19. sect. 9. should discharge it. And with regard to that clause of the act which says, "that creditors by judgment, statute, "&c. whereof no execution or extent is served or executed "on the lands or goods of the bankrupt before his becoming "bankrupt, shall not be relieved for more than a rateable part "of their just debt, without respect had to the penalty of the "statute or judgment." We urged, this extended only to relieve against the *penalty*; and the words, [creditors seeking relief shall not be relieved,] &c. must be intended to mean,

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[should not be relieved upon the commission of bankruptcy in a court of equity]; but if at law they could prevail, (as here, by an extent upon the land), the statute did not hinder them.

But all the judges of *C. B. contra*; who held that the clause of the statute was full and plain, that all the creditors of the bankrupt, unless where there was a mortgage, should be equally paid. And,

Trevor, C. J. said, A judgment or recognizance did no more bind the lands than the *teste* of a *fi. fa.* (*z*) bound the goods at the time of the making of this statute; and it was plain, if the *fi. fa.* was not served and executed, such creditor, notwithstanding his suing out his *fi. fa.* should come in only in proportion with the creditors even by simple contract.

(*z*) See *Philips* v. *Thompson*, 3 Lev. 69, 191.

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DE TERM. S. HILLARII, 1706.

CASE 19.

BECK *versus* REBOW.

Hangings, chimney glasses or pier glasses, are matters of ornament and furniture, and not to go with the house.

THE plaintiff *Beck* married the daughter of alderman *Chamberlain*, and in consideration of this marriage, and of a settlement made by the plaintiff *Beck* on his wife, and the issue of the marriage, Alderman *Chamberlain* covenants to settle his house in *Leadenhall-street* on the plaintiff *Beck* and his wife, and the

issue of the marriage; and likewise covenants to grant to the plaintiff all the pictures upon the staircase, over the doors and chimney-pieces, and *all things fixed to the freehold* of the messuage.

Alderman *Chamberlain* died, having made the defendant his executor, to whom he devised this house in trust, to settle it according to the marriage articles; but the defendant the devisee in trust of the house, had, after the death of the testator, taken away the pictures upon the staircase, and over the doors and chimneys, and likewise the pier-glasses, hangings, and chimney-glasses, which the plaintiff alledged were as wainscot, and fixed to the freehold of the house; and the bill (*inter al'*) was, that the defendant should make a specifick performance of the articles, and account for the value of the pier glasses, pictures, chimney-glasses, and hangings, which the defendant had taken away.

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It was urged for the plaintiff, that these hangings, pier-glasses, chimney-glasses and pictures were as wainscot, being fixed with nails and screws to the freehold; and that there was no wainscot under them; and as they would have gone to the heir, and not to the executor:

So *à fortiori*, would they in this case go to the plaintiff, who was as a purchaser of the house in consideration of marriage, and a settlement; and especially, the covenant being to grant to the plaintiff all things fixed to the freehold: and the case of *Cave* v. *Cave* (*a*) was cited as in point.

(*a*) 2 Vern. 508.

But Lord-Keeper, as to all but the pictures over the doors, chimney-pieces, and on the stair-case, was of a different opinion; saying, that hangings and looking-glasses were only matter of ornament and furniture, and not to be taken as part of the house or freehold, but removeable by the lessee of the house. (*z*)

(*z*) So *Harvey* v. *Harvey*, 2 Str. 1141. And see *Squier* v. *Mayer*, 2 Freem. 249. *Ex parte Quincy*, 1 Atk. 477. *Lawton* v. *Lawton*, 3 Atk. 13. *Dudley* v. *Ward*, Amb. 113. *Fitzherbert* v. *Shaw*, 1 H. Bl. 259. *Lawton* v. *Salmon*, ib. n. *Ponton* v. *Robart*, 2 East, 88. *Elwes* v. *Maw*, 3 East, 38. *Buckland* v. *Butterfield*, 2 Brod. & B. 54. 4 B. Moore, 440. S. C.

16. Jur. 260.
2. Eng. & Kee. 24.
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DE TERM. S. TRINITATIS, 1707.

CASE 20. LORD BINDON *versus* EARL OF SUFFOLK. (1)

LORD CHANCELLOR COWPER.

2 Eq. Ca. Abr. 535. pl. 3. Devise of a debt to two, share and share alike, equally to be divided between them, and if any of them die, then to the survivor; they are tenants in common, and not jointenants. *Qu.* (2)

THE late Earl of *Suffolk* did by his will give and bequeath the sum of 20,000*l.* (due to him from the crown) to his five grandchildren, share and share alike, equally to be divided between them, and if any of them died, then his share to go to the survivors and survivor of them.

Upon this the only question was, whether the five grandchildren were tenants in common or jointenants?

And on debate, Lord Chancellor held and decreed, that the grandchildren were tenants in common, and not jointenants; so that if one died, his share should go to his executors, and not to the survivors. The reasons on which he grounded his opinion were, that by the first words [share and share alike] it was very plain the legatees were tenants in common; and

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by the subsequent words [that if any of them died, his share shall go to the survivor] it must be intended, if any of them should die *in the life-time of the testator;* for by that construction, every word of the will would have its effect and

(1) The bequest upon which this question arose was in the following words, "I do hereby give and devise "the said 20,000*l.* unto my brothers "*George Howard* and *Henry Howard*, "and unto *Henry Howard*, *Edward* "*Howard*, *Charles Howard*, and *Di-* "*ana Howard*, sons and daughter of "my said brother *Henry Howard*, "equally to be divided between them, "share and share alike; and if either "of them die, to the survivors or sur- "vivor of them." *George Howard* survived the testator, but died before any part of the money was paid, and upon his share the question was made. 1 Bro. Parl. Ca. 189.

(2) Vide *Barker* v. *Giles*, Vol. II. 280. *Haws* v. *Haws*, 3 Atk. 524, and 1 Vez. 14. S. C. *Stones* v. *Heurtley*, 1 Vez. 165. *Rose* v. *Hill*, 3 Burr. 1881. Earl of *Salisbury* v. *Lambe*, Amb. 383. (*z*)

(*z*) 1 Eden, 465, S.C. And see *Anon.* 11 Hill's MSS. 311. *Rous* v. *Rous*, 10 Hill's MSS. 323, & Loft, 97. S.C.

operation: for were it not for this clause, if any of the grandchildren had died in the life of the testator, that grandchild's fifth part would have been a (*a*) lapsed legacy, and have gone to the executor, as undisposed of by the will; but by this devise over, if it should so happen that any of the grandchildren should die in the life-time of the testator, such share would go to the survivors.

(*a*) See post. 700. Bagwell v. Dry.

And though it was objected, that the will of the testator could not speak, nor take any effect, until the testator was dead; yet the Lord Chancellor observed, that the will was *inchoate*, though *not consummate*, from the execution of it; and that to many purposes in law, it did relate to the (*b*) time of the making; and the words [if any of my grandchildren die] must not be taken indefinitely, for it is most certain that they and all others must die: and to understand it in the sense that had been contended for by some (*viz.*) "if any of my grandchildren should die before the receipt of the money," that was intirely *dehors*, there being nothing in the will tending to justify such construction.

(*b*) Salk. 237. and post. Gore v. Gore, Vol. II. 28. Wind v. Albone, post. 575.

So that it must be understood, if any of the grandchildren should die in the life of the said testator, from which construction every word of the will would take effect.

This decree was reversed on appeal to the Lords. Though *quære*, whether in the case of *Stringer* and *Philips*, which was (*c*) decreed at the *Rolls*, in *Mich.* 1730, Lord *Cowper's* opinion, be not adhered to? (*z*)

(*c*) Abr. of Cases in Equity 292, 3. (1)

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(1) The words of the decree in *Stringer* v. *Philips*, are these "His Honour "declared that the devise of the said "100l. after the death of the said tes- "tator's sisters *Lucy* and *Katherine*, "unto the said *Margaret Wiskey*, "*Mary Harris*, *Elizabeth Tucker*, "*Mary Parker*, and *Alice Stringer*, "to be equally divided between them "and the survivors and survivor of them, "is a tenancy in common and not a joint "tenancy, and that the words *survivors* "*and survivor of them*, are to be un- "derstood of such of them as shall be "living at the testator's death." Reg. Lib. B. 1730. fol. 177.

(*z*) The reversal is said to have proceeded on the particular circumstances of the case; *Brograve* v. *Winder*, 2 Ves. jun. 638. The authority of Lord *Cowper's* determination, as a general rule, has been frequently recognized; see *Roebuck* v. *Dean*, 4 Bro. C. C. 403. 2 Ves. jun. 265. *Perry* v. *Woods*, 3 Ves. 204. *Maberly* v. *Strode*, ib. 450. *Russell* v. *Long*, 4 Ves. 551. *Shergold* v. *Boone*, 13 Ves. 375. *Garland* v. *Thomas*, 1 N. R. 82. *Cripps* v. *Wolcott*, 4 Madd. 11. Et vide *Douglas* v. *Chalmer*, 2 Ves. jun. 501. *Hinckley* v. *Simmons*, 4 Ves. 160. *Cambridge* v. *Rous*, 8 Ves. 12. *Edwards* v. *Symonds*, 6 Taunt. 213. *Galland* v. *Leonard*, 1 Swan. 161. *Doe* v. *Abey*, 1 M. & S. 428. *Harvey* v. *Mc Laughlin*, 1 Price, 264. *Hoghton* v. *Whitgreave*, 1 Jac. & W. 146.

(95). 2. Ch. 351.

DE TERM. S. MICHAELIS, 1707.

CASE 21.

HIGGINS *versus* DOWLER, ON DEMURRER.

Salk. 156.
2 Vern. 600.

Limitation of a trust of a term to a man for life, remainder to his first, &c. son in tail, and for want of issue male, then to all his daughters, there never having been a son; adjudged the trust to the daughter good. (1)

ALICE Higgins demised the premisses (being a term for 999 years) to trustees, in trust for herself during her own life, and after her death for *Henry Higgins* her son, after his death, for *Mary Dowler* his intended wife, and after their several deceases, for the eldest son of the said *Henry Higgins* begotten on the body of the said *Mary Dowler*, in tail; and for default of issue of such first begotten son for all and every the other son and sons of the said *Henry Higgins*, begotten on the body of the said *Mary Dowler*; and for default of issue male of the said *Henry Higgins* begotten on the body of the said *Mary Dowler*, then in trust for all and every the daughters.

There never was a son of the said marriage, but there was a daughter; and the husband and wife being both dead, it was objected by Sir *Thomas Powis*, that the limitation of the

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(1) Notwithstanding that the authority of this case has been in some instances called in question (as in *Clare* v. *Clare*, Ca. temp. Talb. 26. *Wyth* v. *Blackman*, 1 Vez. 202.) yet it seems now fully established by *Stanley* v. *Leigh*, Vol. II. 686. *Brooks* v. *Taylor*, Mos. 188. *Stephens* v. *Stephens*, Ca. temp. Talb. 228. *Gower* v. *Grosvenor*, Barnard. 54. (*z*) *Sheffield* v. Lord *Orrery*, 3 Atk. 287. *Pelham* v. *Gregory*, 5 Bro. P. C. 435. *Doe* v. *Fonnereau*, Doug. 487. *Marsh v. Marsh*, 1 Bro. C. C. 293. *Knight* v. *Ellis*, 2 Bro. C. C. 570. *Hockley* v. *Mawbey*, 3 Bro. C. C. 82. the result of which cases (in the words of Mr. Fearne), is, "that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect (if at all) within 21 years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested." Fearne's Cont. Rem. 407. Vide also the notes to *Doe* v. *Fonnereau*, Doug. 487, *et seq.* (*y*)

(*z*) S. C. 5 Mad. 337.

(*y*) And see *Burnsall v. Davy*, 1 Bos. & Pull. 215. *Wilkinson* v. *South*, 7 T. R. 555. *Phipps* v. *Mulgrave*, 3 Ves. 613. *Brown* v. *Higgs*, 4 Ves. 717. *Deerhurst* v. *D. of St. Albans*, 5 Mad. 232. *Bret* v. *Sawbridge*, 3 Toml. P. C. 141, & Sug. Vend. app. 35.

trust to the daughter was void, it being after limitations in tail to the sons, which in case of a term was not to be allowed, HIGGINS v. DOWLER.

Sed per Lord Chancellor with great clearness: there is a diversity where the limitation in tail ever vested; for there it must be admitted the remainder over would be void; but as in this case there never was a son, the remainder of the trust of the term to the daughter is good; and it is no more than a limitation of a trust of a term two ways, (*scil.*) if there be a son by the marriage, then the limitation is to that son, but if there be no son by the marriage, but a daughter, then to that daughter; and this is not too remote a contingency, because confined to a life in being.

However, as I am not for determining this point without further consideration, over-rule the demurrer.

But afterwards on the (*a*) hearing, his Lordship dismissed the bill. (*a*) 30 May, 1708.

On the authority of this case, that of *Stanley* v. *Leigh* was adjudged by his Honor the Master of the Rolls, which see, post. Vol. II. 686.

GAWLER *versus* WADE.

CASE 22.

ONE binds himself and his heirs in a bond, and devises his lands to *J. S.*; the bill was brought upon the statute of the third and fourth of *William & Mary, cap.* 14. to affect the real assets in the hands of the devisee.

2 Eq. Ca. Abr. 165. pl. 4. One seised of lands in fee binds himself and his heirs in a bond, and devises his lands to J. S. in fee, and dies; in a bill brought by the obligee in the bond, to subject the devisee to the payment of debts, the devisor's heir must be made a party. (1)

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And objected, that the *heir* of the devisor ought to be made a party to the suit, the statute saying, that an action of debt shall be brought against the heirs at law, and such devisees *jointly*.

It was answered by the other side, that the will, having given all from the heir, and thereby broken the descent, it

(1) So *Warren* v. *Stawell*, 2 Atk. 125. (*z*)

(*z*) And see *Wilson* v. *Knubley*, 7 East. 138.

GAWLER v. WADE.

would be a vain thing to make the heir a party, in regard it would only oblige the plaintiff to pay him costs; that it was true, had some part of the real assets descended to the heir, then the heir was to be made a party, for then there was to be an average (*z*); but when nothing descended to the heir, there could be no reason, in such case, for bringing him before the court.

And though, in an action at law, it was necessary to make the heir a defendant, that was, because the debt was in the *debet & detinet*, and the heir privy to the ancestor, and the devisee not; and so, for conformity sake, the statute, in an action at law, directed that the heir should be a co-defendant; yet it was otherwise in a suit in equity.

Lord Chancellor *Cowper*: It is the act of parliament makes this assets in the devisee's hands; and *that* requiring the heir to be made a defendant, you must follow the remedy therein prescribed; and this bill in equity, is as an action at law; otherwise if there were no heir (*y*): and perhaps it might be otherwise too, if the bill had charged that the plaintiff had made inquiry, and could find or discover no heir.

(*z*) But see *Galton* v. *Hancock*, 2 Atk. 435. and see *Chaplin* v. *Chaplin*, post. Vol. III. 367.

(*y*) But quære if the Attorney General must not in such case be made a party? See *Humberston* v. *Humberston*, post. 333.

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CASE 23.

YOUNG *versus* COTTLE *et è cont.*

Appointment by deed of such and such annuities to be paid out of an office, countermandable. (*x*)

THE archbishop of *Canterbury* in 1673, granted the register's office of the prerogative-court to *Mark Cottle*, *Exton* and *Sheldon*, for their lives; *Sheldon* dies; *Exton* declares by deed, that his name was used in trust for *Mark Cottle*, and covenants to depute *Mark Cottle*, his executors or administrators, or such as he should appoint, and in the mean time to receive the profits to such uses, and under such trusts, as *Mark Cottle* should direct.

(*x*) See 15 Vin. Ab. 94. E.

Mark Cottle by deed (executed so long since as in 1679 and all of his own hand writing,) appoints, that after his death, one *Richard Hoar*, who was then in his office, should be the deputy register; and in case of his death, or removal, such other person as his executors should appoint; and directs several annuities to be paid out of the office, and that one moiety of the surplus should be paid to his wife for her life, and after her death, to the defendant's father *Mark Cottle* the younger, (being nephew of old *Mark Cottle*) and the defendant; and the other moiety to belong to the said *Mark Cottle* the nephew, and the defendant his son.

Under this deed (old *Mark Cottle*'s wife being dead, and *Mark Cottle* the nephew being also dead,) the defendant surviving his father, became well intitled to the whole profits of the office.

But old *Mark Cottle* did, by another subsequent deed in 1681, make different appointments of the profits of the office, under which the defendant was intitled to the profits of a moiety of the office only, and *Hoar* (who was to be deputy of [102] the office after old *Mark*'s death,) died; upon which old *Mark*, by the latter deed, appointed another deputy, and soon after old *Mark Cottle* died, leaving his widow executrix, who, claiming a greater interest in the office under the latter, than under the former deed, concealed the former; and a good account was given in proof, why the defendant did not claim under the first deed for so many years, but accepted his share under the second deed.

And now the only question was, which of these two deeds should prevail?

It was objected, that the first deed, being an absolute disposition of the profits of the office, without any power of revocation, ought to stand; and though this first deed was all along in the custody or power of old *Mark Cottle*, yet so, (generally) were all voluntary settlements, notwithstanding which in case of (*a*) two different voluntary settlements of the same estate, the first should prevail; and the case of the duchess of *Albemarle* (*b*) and the earl of *Bath* was cited, where there was a voluntary settlement, and a power of revocation in the presence of six witnesses, whereof three were to be peers, and there was a writing importing a revocation, but not being attested according to the power, it was not sufficient.

(*a*) Vide 2 Vern. 473. Clavering v. Clavering, accord'; sed post. 577. Naldred v. Gilham contra.

(*b*) Cases in Chanc. part 3. p. 55.

YOUNG *v.* COTTLE.

On the other side it was answered, that this appointment of 1679, in the first deed was in the nature of a *will*, and consequently revocable by any latter deed.

Lord Chancellor: The first deed is only an authority, and therefore clearly countermandable by the second; and it is
[103] no more, than if one should appoint his bailiff of his manor of *Dale*, to pay one moiety of the profits to *A.* and the other moiety to *B.* this is countermandable at pleasure; and by the same reason that old *Mark Cottle* could appoint another deputy after his death to manage the office, (*Hoar* the first appointed deputy being dead,) so could he also make another disposition of the office.

Whereupon the court decreed against the first deed in favour of the second, and that the first should be delivered up.

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DE TERM. S. HILLARII, 1708.

CASE 24.

COLLINS *versus* PLUMMER.

2 Vern. 635. Gilb. Chanc. 252. Upon a settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife Jane, and in the same deed *A.* covenants not to suffer a recovery, but that the lands shall be enjoyed according to these limitations; *A.* does suffer a recovery and devises the lands; the covenant good to bind the assets; but *A.* being tenant in tail, and as such, having power to suffer a recovery, the lands devised shall not be affected. (*z*)

ONE in consideration of marriage settles lands upon himself for life, remainder to his intended wife for life; remainder to the heirs of his body on his wife to be begotten; remainder to his own right heirs.

And in the deed of settlement there is a covenant with the trustees from the intended husband, for himself and his heirs, that he will not discontinue, dock, or suffer any reco-

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(*z*) See *Diddleford* v. *Tichner*, 1 Dick. 34. *Legard* v. *Hodges*, 3 Bro. C. C. 538, 4 Bro. C. C. 421, and 1 Ves. jun. 477. S. C.

very, to bar the limitations in the settlement, but that the issue of the marriage shall enjoy and hold the premisses pursuant to the said limitations.

The marriage takes effect; and they have issue a daughter, who marries the plaintiff, and to whom her father, who made the settlement and covenant, gave a considerable portion.

The father afterwards suffers a recovery to the use of himself and his heirs, and then devises the lands in trust for his said daughter for life, with remainder to her first, &c. son in tail male; and if the daughter survived the husband, to the daughter in fee; but if the daughter should die first, then the remainder over, and dies. [105]

The husband and wife bring a bill against the devisee and executor of the father for a specifick performance of the covenant; and for the plaintiff it was insisted, that this covenant was not only a good covenant, but bound the land.

And though a condition that tenant in tail should not suffer (*a*) recovery, was (1) void, just as a condition that tenant in tail should not alien was: yet, in each of those cases, a covenant not to alien, or a covenant that tenant in tail should not suffer a recovery, was good. (*a*) 1 Inst. 224.

Then, if this covenant was a good covenant, it should in equity operate as a disability upon the father from suffering a recovery; especially, in regard it was in the marriage-settlement, and consequently to be taken as part of it; and it was compared to the lord *Peterborough*'s case, where there was tenant for life, with a power to make leases; and the tenant for life covenanted he would not make leases; but afterwards notwithstanding his covenant, executed such power; upon which equity set aside the leases; and for the same reason equity should set aside this recovery, or at least decree, that those claiming under it, should convey such estate to the daughter and heir of the marriage, and in such manner as she should have taken, if such recovery had not been suffered.

On the contrary it was urged, that a condition that tenant in tail should not alien by recovery, was void; and a covenant, if it would affect the land, was the same tie upon the land as a condition, and consequently must be void too. [106]

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(1) Harg. Co. Litt. 223, b. note 1. and *Driver* v. *Edgar*, Cowp. 379.

COLLINS v. PLUMMER.

That it was an useful maxim in law, that lands should not be unalienable.

But besides, the devise, as here penned, answered the intent of the settlement; and it was the husband of the daughter that would now have the intail in the daughter, in order that by a recovery, he might get the estate vested in himself, and deprive the family of it; whereas by the limitations in the will the estate was secured to the heirs male of the marriage; and the wife, if she survived, was to have the fee.

Lord Chancellor: The covenant being in the same deed with the settlement, proves that the conveyancer knew very well that the father might suffer a recovery, and that it was an intail in him.

Articles to settle lands to one for life, remainder to the heirs of his body; in execution of the articles, equity shall go according to the intent, and not direct an estate-tail according to the words.

And tho' if this were only articles by which lands were covenanted to be conveyed to *A.* for life, with remainder to the heirs male of his body; on a bill brought for the execution of such articles, the lands would be settled upon *A.* for life, (*a*) with remainder to his first, &c. son in tail male; yet here it is the case of an actual settlement, and not of articles.

(*a*) See the case of Trevor v. Trevor, post. 622.

The conveyancer knowing, therefore, that it was an intail in the father, who took by the same deed, it is plain the intention of the deed was, that the parties should rely and depend on the security of the father's covenant; and equity ought not to vary or alter the security which the other side has agreed to accept of, for that would be going beyond, and consequently against, the intent of the parties.

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One covenants to leave his daughter 10,000*l.* equity will not compel him to give any further security than this covenant, that being at first accepted. (*b*) Pre.Cha. 89. Also see post. 461. Bosvil v. Brander. (1)

It may be compared to the case of Lord (*b*) *Warrington* and Sir *Stephen Langham*, where one covenanted to leave his daughter 10,000*l.* and it was sought by the bill to make the party give security for performance of this agreement; but denied *per cur'*; because the plaintiff agreed to accept of the covenant, and equity would not alter the agreement of the parties: and this differs from the case of Lord *Peterborough;* because here the covenant is in the *same* deed, but there was an agreement *subsequent* to the raising of the power, to extinguish it. Further, in this case the intent of the settlement

(1) And *Flight* v. *Cook*, 2 Vez. 619.

is more effectually answered, than it would have been if the land had descended in tail to the daughter; for then it would have been alienable from the issue male; whereas here it cannot; and therefore I am of opinion, the covenant does not bind the land, so as to defeat the will or recovery.

But it being pressed, that they might be at liberty to sue the executor, and recover out of the personal assets, and in order thereto, that an issue might be directed:

Per cur': Then let the issue be, not what the *husband* but what the *wife*, or her *issue*, is damnified by the breach of this covenant.

Tho' surely the plaintiffs come too soon in this case, for the wife may survive; and the whole being limited to the wife, if she does survive, she perhaps may be no ways damnified.

Also it being alledged, that the testator did moreover give a portion to the daughter, the defendant shall have liberty to give in evidence any thing of that kind, which may tend to a satisfaction of this breach of covenant. (*z*) [108]

The court likewise observed, that the covenant in this case was, not only that the father should not suffer a recovery, but that the premisses should be held and enjoyed pursuant to the uses limited, which latter covenant, being executory, was the stronger, as it might afford some pretence for a specific performance thereof: but upon the whole,

His Lordship thought the latter covenant was to be construed as relative to, and dependent upon, the former, and to be restrained by *that*; and to have meant no more, than that the father should not, by suffering a recovery, prevent the premisses from being enjoyed according to the said limitations.

(*z*) *Copley* v. *Copley*, post. 147.

Case 25.

WATTS & al' *versus* BALL & al'.

Ld. Chancellor Cowper.

THE case in effect was: One seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally.

2 Eq. Ca. Abr. 727. pl. 2. Vide 2 Vern. 680. where this case is cited.

There shall be a tenancy by the curtesy of a trust, as well as of a legal estate. (1)

The younger daughter married and died, leaving an infant son and her husband surviving.

The eldest daughter brought a bill for a partition; and the

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only question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the curtesy?

The husband in his answer had sworn, that he married the younger daughter, upon a presumption that she was seised in fee of a legal estate in the moiety; that at the time of the marriage she was in the actual receipt of the profits of such moiety; and it was admitted, that this trust was not discovered, until after the death of the younger daughter, nor until it was agreed, that a partition should be made.

(*a*) Vide ante, 35. Philips *v.* Philips.

Decreed by Lord Chancellor, that (*a*) trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust-estate; and if there were not the same rules of property in all courts, all things would be, as it were, *at sea*, and under the greatest incertainty.

His Lordship added, that this being a case of some difficulty, he could have wished it had not come before him as a cause by consent; but his opinion was, that the husband ought to be tenant by the curtesy; and the rather, because it appeared that he, upon his marriage, did conceive and presume his wife to be seised of a legal estate in the moiety, and had reason to think so, she being in possession thereof.

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(1) So *Chaplin* v. *Chaplin*, Vol. III. 161, 182. (*z*) Et Vide Harg. Co. Litt. 234. *Casborne* v. *Scarfe*, 1 Atk. 603. 29, a. note 6. *Burgess* v. *Wheate*, 1 Bla. Rep. 138,

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(*z*) 1 Eden, 194, 226. S.C.

Wherefore it was decreed, that an estate for life in a moiety in severalty, should be conveyed by the trustees to the husband, with remainder in fee to his son. WATTS v. BALL,

In this cause Mr. *How* (who was for the husband) cited the case of *Sweetapple* v. (*b*) *Bindon*, where money was devised to be laid out, for the benefit of a feme sole, in the purchase of lands in fee; the feme married, and had issue, and died, the husband surviving; and decreed in equity, that tho' the money was not invested in a purchase during the life of the wife, yet in regard, in this case, if it had been so laid out, the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was equally intitled. (1) [110]

(*b*) 2 Vern. 536. So where money is to be laid out in the purchase of lands in fee, to be conveyed to the wife, though the wife dies before the purchase made.

And Mr. *Vernon* told me, that tho' in the case of (*a*) Lady *Radnor* and *Vandebendy* it was decreed in equity, and affirmed in the House of Lords, that a feme dowress should not have the benefit of a trust-term, where the husband died seised of the legal estate of the freehold, yet that the contrary, on consideration, was decreed (2) by Sir *John Trevor* Master of the Rolls, in the case of *Dudley* (*b*) v. *Dudley*.

(*a*) Cases in Parl. 69. Whether tenant in dower shall have the benefit of a trust term. Vide post. Lady Williams v. Wray, 138.

(*b*) Pre. Cha. 241. But in what cases, and under what circumstances a dowress shall have relief in this court, see discussed at large by the late Master of the Rolls (Sir *Joseph Jekyll*) in his resolution in the case of *Banks* and *Sutton*, post. Vol. II. 700.

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(1) So *Cunningham* v. *Moody*, 1 Vez. 176.

(2) But Lady *Radnor* v. *Vandebendy*, was the case of a dowress claiming against a *bonâ fide* purchaser, and Sir *John Trevor* expressly distinguished it from *Dudley* v. *Dudley*, on that ground.

DE TERM. S. MICHAELIS, 1709. [111]

myl + Kee. 514.

LAMPLUGH *versus* LAMPLUGH. CASE 26.

ONE had two sons by several venters, upon the younger of which, an estate was settled expectant upon his mother's death; and the father purchased an estate, part freehold of inheritance, and the other part a lease for a term of years (of which land he himself had the inheritance,) and bought

2 Eq. Ca. Ab. 415. pl. 3. Father buys an estate in the name of his younger son and of a trustee, it shall be taken as an advancement: So though a reversion be settled on the younger son, expectant on the mother's death.

LAMPLUGH v. LAMPLUGH.

these lands, the freehold, in the names of the younger son and the father's nephew, and the leasehold, in the names of the younger son and the father's mother.

But in the conveyance, the whole purchase-money was mentioned to be paid by the father.

After this, the father took the profits during his life, and died, leaving the younger son about the age of eight years.

The eldest son brought his bill against the younger son and the respective trustees, insisting, that the money being mentioned in the deed to have been paid by the father, this made

[112] the defendants trustees for the father, and consequently for the plaintiff.

But the trustees disclaiming any interest in the estate, it was decreed by the Lord Chancellor, 1*st*, that the younger son was a son unprovided for, notwithstanding this reversion which he was intitled unto after his mother's death; for the mother might survive the father many years, and in that time the younger son might starve, if he were to have no other provision.

2*dly*, That if the purchase had been made in the younger *son's name only*, this had been plainly an advancement of the younger son, and no trust (1); and the present case did not differ, in regard the persons named with him did disclaim; and especially since prudential reasons might be given, why these persons were joined, (*viz.*) that they might help and

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(1) So Lord *Grey* v. Lady *Grey*, Finch, 338, and 1 Cha. Ca. 296. S. C. *Elliot* v. *Elliot*, 2 Cha. Ca. 231. *Mumma* v. *Mumma*, 2 Vern. 19. *Taylor* v. *Taylor*, 1 Atk. 386. *Stileman* v. *Ashdown*, 2 Atk. 480. So by grandfather in grandson's name (father being dead), *Ebrand* v. *Dancer*, 2 Cha. Ca. 26. So, notwithstanding the father makes a *subsequent* declaration of trust for himself, *Elliot* v. *Elliot*. So if purchase made in joint names of father and son, *Scroope* v. *Scroope*, 1 Cha. Ca. 27. *Back* v. *Andrews*, 2 Ver. 120. But this is a weaker case than the former, *Pole* v. *Pole*, 1 Vez. 76. And the son shall not have the benefit of survivorship as against a judgment creditor of the father, *Stileman* v. *Ashdown*, 2 Atk. 477. (*z*)

(*z*) A purchase of a copyhold by a father, in the joint names of himself and his son, is to be presumed an advancement, even though there be a custom in the manor to grant copyholds for several lives, and that the grantees shall take *successivè*, unless it be shewn by evidence contemporaneous with the purchase, that the son was intended to be a trustee, *Dyer* v. *Dyer*, 2 Cox, 92. 1 Watk. cop. 222. S. C. And see *Rumboll* v. *Rumboll*, 2 Eden, 15. *Glaister* v. *Hewer*, 8 Ves. 189. *Finch* v. *Finch*, 15 Ves. 43. *Murless* v. *Franklin*, 1 Swan. 13. *Swift* v. *Davis*, 8 East, 354. n. *Prankerd* v. *Prankerd*, 1 Si. & Stu. 1.

protect the infant younger son; also to prevent the estate's descending to a remote relation, in case the younger son by the second venter should have died before his father; for in such case, a court of equity might have said, if the father were to come for the estate, that though this would have been an advancement, in case the younger son had lived to have enjoyed it, yet the younger son dying, the trustees should, in equity have conveyed it back to the father; and this might be the use and intention of naming these trustees: besides, the younger son being but eight years old, was unfit to be a trustee, and therefore must be intended to have been named for his own benefit. (1)

3*dly*, It was also ruled, that the statute of frauds and perjuries, which says "(*a*) that all conveyances, where trusts "and confidences shall arise or result by implication of law, "shall be as if that act had never been," must relate to *trusts* and *equitable interests*, and cannot relate to an *use* which is a *legal estate*.

(*a*) Sect. 20.

[113]

Lastly, That parol evidence should be admitted to shew the intention of the father, that this conveyance was for the benefit and advancement of the younger son; because it concurred with the conveyance, and was only to rebut (*b*) a pretended resulting trust: and as to the father's taking the profits during his life, that could be no evidence of a trust for him, for it must be intended to have been done by him as guardian (*c*) to the son.

(*b*) Vide the next case. (2)

(*c*) Vide post. Lloyd v. Read, 608. (3)

And the eldest son's bill was dismissed with costs.

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(1) The like argument holds against a resulting trust of a residue in an infant executor. Vide the conclusion of Lord *Hardwicke*'s judgment in *Blinkhorne* v. *Feast*, 2 Vez. 30.

(2) Vide also *Ulrich* v. *Litchfield*, 2 Atk. 372. *Petit* v. *Smith*, ante, 9. and more particularly *Rachfield* v. *Careless*, post. Vol. II. 158.

(3) And *Stileman* v. *Ashdown*, 2 Atk. 480. (*z*)

(*z*) *Rider* v. *Kidder*, 10 Ves. 360.

DE TERM. S. HILLARII, 1709.

CASE 27. LADY DOWAGER GRANVILLE *versus* DUCHESS DOWAGER OF BEAUFORT.

2 Vern. 648. An executor has a particular legacy, and yet held entitled to the surplus.

THE late Duke of *Beaufort* by his will gave several specific legacies to all his children and grandchildren, and devised the use of his silver plate, for the service of his table, to the defendant his duchess for her life, and afterwards to his grandson the now duke; and appointed the defendant the duchess his executrix, without making any express disposition of the surplus.

The question was, whether the duchess the executrix should have the surplus, or whether it should go according to the statute of distribution.

And after solemn argument, Lord Chancellor *Cowper* decreed the surplus to be distributed among the next of kin, upon the authority of *Foster* and *Munt*'s case (*a*) resolved in the House of Lords: the reasons of which resolution were, that where the testator gives part of his personal estate to his executor, this excludes him from the rest; for that the executor cannot have *all* and *some*; so that as to the surplus the testator dies intestate, and it shall be distributed. (1)

(*a*) Vide 1 Vern. 473. and ante, p. 8.

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And though it was objected, this was only the *use* of the plate devised, and not the *plate itself*: his Lordship said, still this was a bequest of an interest out of the personal estate, and the smaller it was, the more it shewed that the kindness of the testator towards the legatee was small. However, the smallness of the bequest was not material; for an express legacy of 5*l.* to an executor, excluded him from the surplus as strongly as a legacy of 25*l.*, and 25*l.* as much as 2500*l.*, and so *ad infinitum*.

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(1) Vide *Petit* v. *Smith*, ante, 7. *Rachfield* v. *Careless*, Vol. II. 158. *May* v. *Lewin*, Vol. II. 162. Lord *Bristol* v. *Hungerford*, Pre. Cha. 81. and Vol. III. 194. note. S. C. *Davers* v. *Dewes*, Vol. III. 40. *Clarke* v. *Andrew*, 2 Vez. 162. and particularly *Farrington* v. *Knightley*, *post*. 544.

Secondly, with regard to the objection of this being the case of a *wife*, the court took notice, that there were not wanting (*a*) instances of the surplus being distributed, even in such cases, and that it would occasion great incertainty, if the nearness of the relation should make a difference; for then, where the brother, sister, son, nephew, &c. were made executors, and also express legatees, each of these cases must create new points, and so it would be impossible to know where to stop.

(*a*) Vide several instances of this kind cited in the case of Farrington v. Knightley, post. 544. (1)

Thirdly, to what had been urged, that the testator could not be said to die intestate as to the surplus, when he had made an executor (*b*), and by express words had said, [this is my will,] the case of *Foster* and *Munt* was said to be liable to the same objection. It was allowed, that had there been plain proof of the testator's declaring or intending his wife to have the surplus, this would have intitled the wife thereto; even though such proof were but parol proof; * for the wife, as executrix, had the legal title to the surplus; and this parol proof would be only to rebut an equity arising to the next of kin, by reason of the express legacy given to the executrix. (2)

(*b*) Post. Farrington v. Knightley, 544.

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Where the surplus is not disposed of by the will, parol proof may be admitted to shew that the testator intended to give the surplus to his executor, it being only to rebut an equity arising by implication in favour of the next of kin. Vide the preceding case.

But that the proof in the present case, of the duke's intent was altogether doubtful and uncertain; [which was however allowed to be read.]

The court also admitted the case of the Countess (*c*) of *Gainsborough* versus the Earl of *Gainsborough*, where the late Lord *Gainsborough* made the Countess his executrix, and instructed the counsel that drew up the will, to insert therein a devise of the surplus of the personal estate to the Countess, and the counsel declared that it was unnecessary, for that she would have it of course as *executrix*; upon which it was decreed that the Countess should have the surplus; it being unreasonable that the executrix should suffer by the obstinacy of the counsel, and by his refusal to follow his instructions.

(*c*) 2 Vern. et vide ante, p. 9.

But afterwards, in the principal case, on an appeal brought by the Duchess the executrix *in domo procerum*, this decree was

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(1) *Randall* v. *Bookey*, 2 Vern. 425. *Ward* v. *Lant*, Pre. Cha. 182. *Newstead* v. *Johnson*, 2 Atk. 46. *Martin* v. *Rebow*, 1 Bro. C. C. 154.

(2) So *Littlebury* v. *Buckley*, 2 Vern. 677. *Batchelor* v. *Searle*, 2 Vern. 736. *Rachfield* v. *Careless*, Vol. II. 158. *Duke of Rutland* v. *Duchess of Rutland*, Vol. II. 210. *Brasbridge* v. *Woodroffe*, 2 Atk. 68. *Lake* v. *Lake*, 1 Wils. 313.

LADY GRANVILLE *v.* DUCHESS of BEAUFORT.

reversed; (1) Lord *Guernsey* and other Lords declaring, that the reason, upon which the former decree of *Foster* and *Munt* (*a*) was grounded, was the fraud, and the will's being drawn at a tavern.

(*a*) Sed vide post. Farrington v. Knightley, 548, where by the better opinion, no fraud was proved in that case.

And upon the decree of reversal in the House of Lords Lord Keeper *Harcourt* founded his decree in the case of *Ball* and *Smith*, (*b*) 1712.

(*b*) 2 Vern. 675.

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(1) 1 Bro. P. C. 305. The case made to the House of Lords by the appellant, considers the devise of the use of the plate to the executrix for life as an *exception* out of the general gift of it to the son, and therefore not such a legacy as should exclude her from the residue, inasmuch as it does not involve the supposed absurdity of giving expressly a part, where the whole is intended to be given. Upon the same principle several other cases have been decided. *Griffith* v. *Rogers*, Pre. Cha. 231. *Hoskins* v. *Hoskins*, Pre. Cha. 263. *Jones* v. *Westcomb*, Pre. Cha. 316. *Newstead* v. *Johnston*, 2 Atk. 45. *Southcote* v. *Watson*, 3 Atk. 226. *Lawson* v. *Lawson*, 7 Bro. P. C. 511.

Eq. 418. [117]

CASE 28.

PHILIPS *versus* CAREW.

2 Eq. Ca. Ab. 13. pl. 3. 159. pl. 2. 180. pl. 1. Bill lies to perpetuate testimony before trial, on affidavit annexed that the plaintiff's witnesses were infirm and unable to travel.

THE bill was brought to discover a title to land, and for an account of the profits, and to perpetuate testimony, &c. (*z*)

(*z*) The reporter in this case confounds bills for perpetuating testimony generally, with bills for examination of witnesses *de bene esse*. A bill to perpetuate testimony generally, can only be filed by a person whose title may be hereafter contested, and who has no immediate opportunity of asserting it at law, e. g. by a party in possession, or by a remainder-man, *Dorset* v. *Girdler*, Pre. Cha. 531. *Dursley* v. *Fitzhardinge*, 6 Ves. 251. It is no objection to such a bill that the plaintiff's title is remote, but he must have an actual interest, *Dursley* v. *Fitzhardinge*, ub. sup. *Smith* v. *Attorney General* (cited), 6 Ves. 260. *Allan* v. *Allan*, 15 Ves. 130. A bill to examine witnesses *de bene esse* can, according to *Angel* v. *Angel*, 1 Si. & Stu. 83, only be brought by a person who has actually commenced a suit to assert his right. But see, as to this, *Moodaly* v. *Morton*, 1 Bro. C. C. 469. 2 Dick. 652. S. C. It must be supported by an affidavit that the witness proposed to be examined is *infirm*, *Bradley* v. *Crackenthorpe*, 1 Dick. 182. *Bellamy* v. *Jones*, 8 Ves. 31.; 70 *years of age*, *Fitzhugh* v. *Lee*, Amb. 65.; *going abroad*, *Shelly* v. ——, 13 Ves. 57. (and for this purpose Scotland is considered a foreign country, *Botts* v. *Verelst*, 2 Dick. 454.) or, *the only witness* to the fact, *Anon.* 19 Ves. 231. See also *Frere* v. *Green*, 19 Ves. 319. *Corbet* v. *Corbet*, 1 V. & B. 335. *Pritchard* v. *Gee*, 5 Mad. 364.

PHILIPS v. CAREW.

The defendant answered as to the title, and demurred as to perpetuating evidence, in regard the plaintiff might bring his ejectment, and examine his witnesses at the trial. (1)

And upon affidavit that the plaintiff's witnesses were infirm, and unable to travel, the demurrer was over-ruled by the Master of the Rolls, and afterwards by the Lord Chancellor on a rehearing. (2) But it was admitted by the Lord Chancellor, that without such an affidavit, the demurrer would have been good, it being a common suggestion in a bill; but when sworn, if such a demurrer should be allowed, it might introduce great inconveniencies and hardships, and a failure of justice.

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(1) Vide *Parry* v. *Rogers*, 1 Vern. 441. *Duke of Dorset* v. *Girdler*, Pre. Cha. 531. *Brandlyn* v. *Ord*, 1 Atk. 571.

(2) Reg. Lib. B. 1709. fo. 193. Et vide *Shirley* v. *Earl Ferrers*, Vol. III. 77.

DE TERM. PASCHÆ, 1710.

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1905.2. K.B.128.

DUKE OF HAMILTON & Ux' *versus* LORD MOHUN.

CASE 29.

LD. CHANCELLOR COWPER.

Salk. 158.
2 Vern. 652.
Gilb. Chan. 297.
1 Eq. Ca. Ab. 90. pl. 6.
10 Mod. 447.

Husband before marriage covenants to release his wife's guardian of all accounts, not binding.

DUKE *Hamilton* married the daughter and heiress of the Lord *Gerrard*, and the articles of marriage were agreed on with great deliberation, one of which was, that Duke *Hamilton* should within two days after marriage, for the peace of the family, release to the Lady *Gerrard* (being the mother and guardian of the young lady) all accounts of the mesne profits of the estate; it being insisted upon by the mother at that time, and admitted by the Duke, that the charge of the education of the young lady, and the interest paid by the mother upon a mortgage of good part of the estate, which had been discharged by her as guardian, would come to as much as the profits of the estate.

Also it was admitted by the parties, that the mother was intitled to her dower of a third of the estate, which was in

HAMILTON *v.* MOHUN.

mortgage for a term of years, but the mortgagee had never entered* upon the premisses. And in the marriage articles
[*119] the Duke bound himself in the penalty of 10,000*l.* to the Lady *Gerrard*, for the giving this release within the said space of two days after the marriage.

Duke *Hamilton* was sued upon these articles at law, and brought his bill in equity to be relieved against them, and for an account of the mesne profits.

First, It was urged for the defendant, who was executor to Lady *Gerrard*, that here was no surprise or misrepresentation, but a very solemn agreement, and which tended to the peace of the family. *Secondly*, that if the Duke had, *after the marriage*, given such release, equity would not have relieved against it; and for the same reason it ought not to relieve against a covenant for the giving such release. *Thirdly*, that if agreements (though upon good consideration and deliberation) could not be made, it might turn to the disadvantage of infants; for then no guardian could be secure from suits, which would end in discouraging all treaties of marriage on behalf of those that were in wardship to them. But,

Lord Chancellor said, that admitting there was no surprise in the gaining of this covenant from Duke *Hamilton*, (as there seemed to be none) it being agreed upon after great deliberation, and advice of counsel on both sides:

And admitting there had been no concealment of the matters to be accounted for, (though in this case the particulars of what was to be released did not so fully appear as they might and ought to have done:)

Yet this covenant to make such release ought to be set
[120] aside, as it seemed to be extorted from the Duke by one who had a power over the young lady courted by him; by one who had a power over her, as her parent; which ought not to have been made use of in this manner.

That it was as if the mother should say, you shall not have my daughter, unless you will release all accounts.

That this agreement was within the same reason as a marriage-brokage agreement, which had been so often condemned in equity. (*a*)

(*a*) Salk. 156. 2 Vern. 392. 588.

A bond to *give* money if such a marriage could be obtained, was ill: and,

By the same reason, a bond to *forgive* a sum of money must be ill also.

That the case of a mother or guardian insisting upon gain for consenting to a marriage, must be a much more frequent mischief, and in all probability oftner happen, than an agreement of this nature with a third person.

That it was most natural in this case to treat with the guardian ; and to tolerate such an agreement, would be paving a way to guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian, in order to such a marriage.

And though such release, had it been given, *after marriage*, by the husband, of all accounts to the guardian, might be good ; it would be, because if such release were given after marriage, it must be presumed to be given freely ; whereas this covenant could not be supposed to be made freely, in regard the Duke might reasonably apprehend, he must have lost the young lady, if he had refused the covenant. [121]

That this was within the common case of equity's relieving an heir against any private agreement with his father, upon the marriage of the heir; as where the father covenants to settle an estate on the marriage, and the heir privately agrees to repay (*a*) back so much out of it to the father ; the heir is under the awe of his parent in such case, and not supposed to act freely ; for which reason a court of equity relieves against all such private agreements. And therefore Lord Chancellor relieved against this covenant to give a release. (1)

(*a*) Vide the case of Sir Nicholas Butler v. Sir Henry Chauncey, cited in the Abr. of Cas. in Chancery, 89.

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(1) As to the grounds of the interference of this court in transactions between guardian and ward, vide *Osmond* v. *Fitzroy*, post. Vol. III. 129. *Hylton* v. *Hylton*, 2 Vez. 547. and *Pierse* v. *Waring*, therein cited; which was heard before Lord *Hardwicke* on the 13th *November*, 1745, where *Samuel Waring*, having been guardian of *Thomas Hall*, who was entitled to a very considerable fortune under the wills of two relations, did by the directions of the said *Thomas Hall*, immediately upon his coming of age, invest a sum of 4,800*l.* part of the personal estate of the said *Thomas Hall*, then in the hands of the said *Samuel Waring*, in the purchase of 3,000*l. East India* stock, in his the said *Samuel Waring*'s name, and on the 22d of *January* following the said *Thomas Hall* confirmed the said 3,000*l.* stock to the said *Samuel Waring* by a deed of gift of that date. The bill was filed after the death of the said *Thomas Hall* by the persons claiming under him, to open the several accounts of the said *Samuel Waring* which had been allowed by the said *Thomas Hall* in his life-time, and as to this sum of 3,000*l.* stock, the chief point made by the bill was, that it was to be considered as an ademption of a legacy of 3,000*l*, given to *Waring* by the will of the said *Thomas Hall*, made just before he came of age. *Waring*, by his answer, insisted upon it as a bounty from *Thomas Hall* in respect of the care

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Secondly, As to the point of dower, it had been objected for the plaintiff, that this was a gift in law, not in equity, and that there could be no dower of a trust, nor consequently of a trust term: and supposing a judgment in dower had in this case, been recovered, yet there must have been a (*a*) *cesset executio* during the term; and it being so at law, *æquitas sequitur legem*. And Lady *Radnor* and *Vandebendy*'s case was cited, Cases in Parliament, 69.

(*a*) Salk. 291. and post. 137. Lady Williams v. Sir Bourchier Wray.

Husband seised in fee mortgages for years, and marries, the mortgagee never enters; the wife on the death of her husband shall be endowed. (1)

But Lord Chancellor, *contra*: There ought to be an allowance of the third part of the profits for dower to the mother, or her representative. The case of Lady *Radnor* v. *Vandebendy* was, where there was a purchaser of the lands, against whom the dowress sought relief in equity as to her dower: whereas

Here, when the mortgagee never insisted to enter for his mortgage, it would be hard that the heir should insist upon it to prevent the dower. Besides, she (had there been occa-

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sion) could have redeemed the mortgage. And as to the want of a formal assignment of dower, that is nothing in equity; for still the right in conscience is the same: and if the heir brings a bill against the mother for an account of profits, it is most just that a court of equity should, in the account, allow a third of the profits for the right of dower. (*y*)

Note, 2 Cha. Ca. 157. *Osburn* v. *Chapman* was cited as a stronger case.

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and attention shewn by *Waring* in the management of *Hall*'s affairs. But Lord *Hardwicke* set aside this deed of gift on the ground of the relation in which *Waring* stood to *Hall*, as appears, as well from the mention made of this case by Lord *Hardwicke* himself in *Hylton* v. *Hylton*, as from the words of the decree, which are these, "His Lordship "declared that the sum of 3,000*l*. *East* "*India* stock having been retained by "the said *Samuel Waring*, guardian of "the said *Thomas Hall* the infant, out "of his estate, just on his attaining his "age of 21, on pretence of a reward or "present for his trouble in the guardian-"ship, ought not, under the circum-"stances of this case, to be allowed by "this court, and doth therefore order "that the said paper writing of the 22d "of *January*, 1727, be delivered up to "the plaintiff to be cancelled." Reg. Lib. B. 1745, fol. 73. See further as to cases of this kind in *Turton* v. *Benson*, post. 496. and *Roberts* v. *Roberts*, post. Vol. III. 66.

(1) Vide *Banks* v. *Sutton*, Vol. II. 707. *Hill* v. *Adams*, 2 Atk. 209. (*z*)

(*z*) S. C. Amb. 6. nom. *Swannock* v. *Lyford*, Co. Lit. 208. a. note 105. *Willoughby* v. *Willoughby*, 1 T. R. 763. *Maundrell* v. *Maundrell*, 7 Ves. 567. and S. C. on ap. 10 Ves. 246.

(*y*) *Graham* v. *Graham*, 1 Ves. 262.

DE TERM. S. TRINITATIS, 1710.

HONOR *versus* HONOR.

CASE 30.

LD. CHANCELLOR COWPER.

2 Vern. 658. 2 Eq. Ca. Abr. 38. pl. 1. Articles and settlement mentioned to be made *in pursuance thereof*, were both made before the marriage, but the settlement varied from the uses in the articles: decreed to go according to the articles. (1)

ARTICLES were made before, and in consideration of marriage, and entered into about twenty-five years since, whereby lands were agreed to be settled to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the *wife* by the husband begotten, remainder to the husband in fee.

Some time afterwards (but before the marriage) the settlement itself was made, and recited the articles; and *in pursuance of the articles* (for so it was mentioned in the settlement) these lands were limited to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the *husband* on the wife to be begotten, remainder to the husband in fee.

The marriage took effect; and there was issue one son (the plaintiff,) and the husband married again, and had several other children.

It was proved that the intent of the parties was, that the father should have but an estate for life; and that it was taken in the family, and by all the relations, that the father had no power to sell or charge the estate. [124]

The father took up 5000*l.* on a mortgage of the premisses, having got the son to join in a fine without any consideration, and the fee-simple and equity of redemption of the mortgaged premisses were limited to the father.

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(1) So *West* v. *Erisey*, Vol. II. 349. and 3 Bro. P. C. 327. *Robert* v. *Kingsley*, 1 Vez. 238. See more on this subject in *West* v. *Erisey*, post. Vol. II. 349. (*z*)

(*z*) And see *Barstow* v. *Kilvington*, 5 Ves. 593. *Jenkins* v. *Quinchant*, ib. 596. note.

HONOR v. HONOR.

The son brought his bill to compel the father to re-convey and re-settle the premisses on the son after his death, and to make the settlement pursuant to the articles.

Lord Chancellor: It is a plain mistake in making the settlement vary from the articles.

The articles are prudent articles; and the wife, though she is to have an estate-tail thereby, yet cannot bar it, but is restrained by 11 H. 7. (1) And it was plainly intended that the father should not have a power of defeating and starving the issue.

And the articles being so, the settlement, which is said to be made pursuant thereto, shews there was no alteration of the intention, nor any new agreement between the making of the articles and the settlement; and this appearing upon the face of the articles and the settlement, and in the plain reason of the thing, the length of time is immaterial.

[125] Therefore decree the defendant the father, and his second wife, to join in a conveyance to settle the estate as by the articles, (*viz.*) to the father for life, remainder to the plaintiff the son in tail. But as to the mortgage, the son having joined in it, this court will not set it aside; but let the father keep down the interest during his life; and in regard the defendant the father insists to take advantage of this mistake, let the conveyance be made at his charge, and let him pay costs.

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(1) Vide *Green* v. *Ekins*, 2 Atk. 477. *Howell*, 2 Vez. 358. *Highway* v. *Banner*, 1 Bro. C. C. 584. (*z*) *Whatley* v. *Kemp*, cited in *Howell* v.

(*z*) Gilb. Uses by Sugd. 339. note (10). *Brudenell* v. *Elwes*, 7 Ves. 390. And 1 Evans's Stat. 214. *Gretton* v. *Haward*, see *Gossage* v. *Taylor*, Style, 325. *Kirk-* 2 Marsh. 9. and 6 Taun. 94. S. C. *man* v. *Thompson*, Cro. Jac. 474.

9. Ves. 375.
3. Atkins 399.
1. Ves. Sr. 379.

CASE 31.

HARVEY *versus* HARVEY.

2 Vern. 659. 1 Eq. Ca. Ab. 58. pl. 7. 2 Eq. Ca. Ab. 149. pl. 3.

A. Having a daughter married to the defendant, by his will devised his personal estate to his daughter, to hold to her particular and separate use, and died.

Devise of a personal estate to a feme covert for her separate use, without naming trustees. *Qu.* Whether good to bar the husband?

HARVEY *v.* HARVEY.

Afterwards the husband, (part of this personal estate consisting of a mortgage), agreed by writing under his hand, that the wife should enjoy it to her separate use.

And the question was (here being no trustees to whom the devise was made), whether the wife should enjoy this personal estate without its being intermeddled with by the husband?

2 Russ & Myl 23

What circumstances will undoubtedly make such will good.

Lord Chancellor: This is a great question, whether the husband shall be compelled to let the wife enjoy this personal estate to her own use?

For though it is objected, that the testator had a power to devise it so, and that his intent was to make use of such power, yet it being given to a married woman, and no contract precedent or subsequent from the husband, that he will not intermeddle with it, the husband's title to this estate is subsequent to the will; and the intention being repugnant to the rules of law, (*viz.*) that a feme covert should have (*a*) property in personal goods; it seems to me to have some difficulty in it.

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(*a*) Vide Burton v. Pierpoint, post. Vol. II. 78.

Wherefore let it be reserved as a case to be argued.

But as to the mortgage, where the husband has contracted or declared under his hand, that he would not intermeddle with it; though such declaration may be voluntary, yet it must be presumed to proceed from a sense the husband had of the testator's intent that the wife should enjoy this mortgage separately; and to be founded on *natural justice*, though not on *contract*. For which reason, the court was clearly of opinion, that the husband should be bound by this agreement.

And Lord Chancellor said, that if a real estate were devised to a feme covert, for her separate use, and a declaration that the husband should not intermeddle with the profits, but that the wife should enjoy them separately, he doubted this would be a repugnant clause, and the husband would still enjoy them. (†)

† It does not appear either by this report, or that in Vern. nor even in the Register's book, what was Lord *Cowper*'s final determination upon this point; but the case of *Bennet* v. *Davis*, (1) which was determined at the *Rolls* in *Decemb.* 1725, seems to have settled it.

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(1) Post. Vol. II. 316. Vide also *Rolfe* v. *Budder*, Bunb. 187. In *Darley* v. *Darley*, 3 Atk. 399. husband was holden a trustee to separate use of wife of an estate devised *to him* for the *livelihood of the wife.*

1. Bea. 247.

CASE 32.

BURRIDGE *versus* BRADYL. (1)

LD. CHANCELLOR COWPER.

Cause by consent.

2 Eq. Ca. Ab. 552. pl. 5. Pecuniary legacies if assets wanting, shall be paid in average; but a legacy given to a wife, in consideration that she release dower, shall be preferred. So money bequeathed to buy land, or an annuity, is as a specifick legacy, and shall not come in average.

A Man has a wife and two daughters, and by his will devises 3,400*l.* to be laid out by his executors in the purchase of annuities in the exchequer for 99 years' term; and to be enjoyed by his wife for her life, she releasing her dower; and after her decease, to go equally to his two daughters; and bequeaths 1000*l.* a-piece to his said two daughters, payable at their age of 21, or marriage; and dies, leaving very little more assets than would pay the 3,400*l.* which was to be laid out in the buying the exchequer-annuities.

And objected, these were all pecuniary legacies, and there being a deficiency, they must all come into average, and suffer alike; that equality was the highest equity: and it would be very hard if the wife, who might marry again, should go away with all, so that the children might, in her life-time, starve, and be without any subsistence.

Lord Chancellor: The 3,400*l.* shall have the preference; and if there be not assets enough to pay the other legacies, they must be lost.

It is of some weight, that these annuities are to go to the children after the wife's death; but especially as the wife is a purchaser of the annuities for her life, by her releasing her dower (2), and for that money ordered by will, or articled to be laid out in an annuity, or in land, is in equity looked upon as an annuity, or land, and consequently to be taken for a specifick devise, (3) and not a pecuniary legacy; it is therefore to be preferred before a pecuniary legacy. (*a*)

(*a*) See the authority of this decree questioned by Lord Parker, post. 541. in the case of Hinton v. Pinke.

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(1) Reg. Lib. A. 1709. fo. 536.

(2) So *Blower* v. *Morrett*, 2 Vez. 420. (where Lord *Hardwicke* considers this case of *Burridge* v. *Bradyl*, to have been determined principally on the ground of the wife being a purchaser of the annuities by releasing her dower.) *Davenhill* v. *Fletcher*, Amb. 244. Vide also *Lewin* v. *Lewin*, 2 Vez. 415. as to priority amongst pecuniary legatees.

(3) *Sed contra*, as to an annuity charged upon, or to be purchased by personal estate, *Hume* v. *Edwards*, 3 Atk. 693. and *Halton* v. *Medlicot*, therein cited.

DE TERM. S. MICHAELIS, 1710.

PYE *versus* GORGE. (1)

CASE 33.

LORD KEEPER HARCOURT.

Salk. 680. Gilb. Chan. 262. 303. 1 Eq. Ca. Ab. 384. pl. 1. Pre. Cha. 308. Trustees for preserving contingent remainders join in a conveyance before the birth of a son; this is a breach of trust, and equity will relieve.

IT was declared by the Lord Keeper *Harcourt*, that where there were trustees appointed by will to preserve contingent remainders, and they, before the birth of a son, joined in a conveyance to destroy the remainders, this was a plain breach of trust; and any person taking under such conveyance, if voluntarily, or having notice, should be liable to the same trusts.

And tho' it was objected, that this had been only *obiter* said in equity, and that there never was any precedent of a decree in such a case:

Lord Keeper said, it was so very plain and reasonable, that if there was no precedent in this case, he would make one.

But this was not the principal case, which was, that there was a son born before the conveyance by the trustees, and the estate being in mortgage, the son came into equity, after the death of the tenant for life, to redeem. [129]

Agreeably to what was thus declared by Lord *Harcourt*, it has been since expressly decreed by Lord Chancellor *King*, assisted by Lord *Raymond* and Chief Baron *Reynolds*, in the case of (*a*) *Mansel* v. *Mansel*, *Dec.* 1732. which was the case of a voluntary settlement; and where the court unanimously delivered it as their opinion, that nothing in common justice, sense, and reason, could be a plainer breach of trust, than that those who were appointed trustees to the intent to preserve the estate to the first son, (and for that purpose only,) should, directly (*b*) contrary to their trust, join in the destruction of the settlement.

(*a*) Vide this case, post. Vol. II. 678.

(*b*) Vide post. 358. Basset v. Clapham, and Else v. Osborne, 388.

(1) Vide this case stated at large, 1 Bro. P. C. 359. The decree was affirmed by the House of Lords.

PYE v. GORGE. But where there is tenant for life, remainder to the first son &c. and no trustees to preserve contingent remainders, in such case, if tenant for life, by fine or feoffment, destroys the remainders, there being no trustee, there can be consequently no breach of trust; (z) and this being the law, chancery will not interpose: but then, as this was a hardship at law, to prevent which, the method of appointing trustees was invented, so it is reasonable that the trustees, when they let in this hardship by violating the trust reposed in them, should themselves be liable for the same; but if the conveyance be voluntary, or if there be notice of the trust, such trust shall follow the land. (y)

(z) *Doe* v. *Elvey*, 4 East, 313. *Doe* v. *Martin*, 4 T. R. 64.

(y) If the trust be *executory*, the court will direct a limitation to trustees to preserve contingent remainders to be inserted in the conveyance, *Harrison* v. *Naylor*, 2 Cox, 247. And see *Winnington* v. *Foley*, post. 536.

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CASE 34.

BENSON *versus* BENSON.

SIR JOHN TREVOR, Master of the Rolls.

2 Eq. Ca. Abr. 41. pl. 1. 720. pl. 2. Where money is agreed by articles to be laid out in land, the party, who would have the sole interest in the land when bought, may elect to have the money paid to him, and that it shall not be laid out in land.

TWO thousand pounds (whereof 1500*l.* were the wife's portion, and 500*l.* the husband's money,) were agreed, by articles before marriage, to be invested in a purchase of lands, to be settled upon husband and wife for their lives, remainder to the heirs of the body of the wife by the husband, remainder to the heirs of the husband.

The husband receives the whole 2000*l.* the wife dies leaving a son and three daughters; after which the husband dying intestate, the eldest daughter takes out administration to the father.

The son brings a bill against his sister (the administratrix) to have the money paid to him, electing that it should not be laid out in land, and settled as had been agreed by the articles.

How, cont'. This may be a prejudice to the sisters, who, if the lands were to be settled, and afterwards the son should die without issue, and without levying a fine, would be in-

titled to them under the contingency; and there can be no reason to deprive the sisters of any contingency; and this bill, tho' said to be brought to *execute* a trust, does, at the same time, seek to *break* it. BENSON v. BENSON.

Cur': A fine cannot be levied of money agreed to be laid out in a purchase of land to be settled in tail; but a decree can bind such money equally as a fine alone could have bound the land in this case, if bought and settled; and in regard the plaintiff the son would have the intire interest in the lands when purchased and settled, and the absolute power over them, and that a court of equity will not decree a (*a*) vain thing: *viz.* decree a purchase and settlement to be made, which the son, the next moment, by a fine, only, may cut off; therefore since the son elects to have the 2000*l.* let him take it, and let the administratrix be indemnified. [131]

(*a*) Post. 389. Seely v. Jago, and Short v. Wood, 471. (1)

Then it was objected by Mr. *How*, that this was not as a debt by specialty from the intestate, but only by simple contract, there being no express contract from the intestate by the articles to pay it: so that it was at most but a breach of trust, as money received and misapplied. *Sed per cur'*: What debt a specialty, and what a simple contract.

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(1) So if the party, being *adult*, could by *fine levied* acquire the entire interest in the lands when settled (as tenant in tail with the immediate remainder to himself in fee); but otherwise, if a recovery would be necessary (as in case of a tenant in tail, with remainders over), *Short* v. *Wood*, post. 471. *Edwards* v. *Countess of Warwick*, post. Vol. II. 173. *Oldham* v. *Hughes*, 2 Atk. 453. *Trafford* v. *Boehm*, 3 Atk. 447. *Cunningham* v. *Moody*, 1 Vez. 176. *Countess of Holderness* v. *Marquis of Caermarthen*, 1 Bro. C. C. 377. (*Contrà*, *Eyre*'s case, post. Vol. III. 13. and Mr. Onslow's case, mentioned in the note to *Eyre*'s case). But the same rule will not apply, where an *infant* becomes so entitled, who is incapable of making an election to vary the nature of the estate. *Earlom* v. *Saunders*, Amb. 242. *Carr* v. *Ellison*, 2 Bro. C. C. 56. (*y*)

(*y*) See St. 39 and 40. Geo. III. c. 56. An order obtained under this act *in vacation*, is usually made to take effect only in case the party shall be living on the second day of the next term, *Ex parte Lowton*, 5 Ves. 12. *Ex parte Bennett*, 6 Ves. 116. So, in term, unless there would be sufficient time to suffer a recovery in the same term, *Ex parte Frith*, 8 Ves. 576. But see *Ex parte West*, at the Rolls, 10th *August*, 1813, Reg. Lib. B. 1812, fo. 1157. where the order was made absolutely in the vacation. Such order will not be made without inquiry, if the party has incumbered, *Ex parte Hodges*, 6 Ves. 576. Nor will the Court on petition determine whether the party would or would not be tenant in tail of the land, *Ex parte Sterne*, 6 Ves. 156. A petition under s. 2. to have *leaseholds*, which by a marriage settlement were directed to be sold, and the produce invested in land to be settled in strict settlement, assigned to the first tenant in tail as securities for money, was refused by Lord Chancellor, *Ex parte West*, 17th *June*, 1813, Reg. Lib. B. 1812. fo. 824. And see *Pearson* v. *Lane*, 17 Ves. 101.

BENSON v. BENSON.

Vide post. Deg v. Deg, Vol. II. 414. (z)

It is a debt by specialty, and to be paid in that degree; for it is agreed by the articles (to which the husband was a party) that it shall be, within such a time, laid out in land; and the husband having received it, and not having laid it out, has broken that agreement; and an agreement under hand and seal, by deed, is a covenant, and consequently a specialty.

(z) *Gifford* v. *Manley*, Ca. tem. Talb. 109.

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DE TERM. S. HILLARII, 1710.

45. ch. D. 429.

CASE 35.

WEBB & AL' *versus* WEBB.

LORD KEEPER HARCOURT.

2 Vern. 688. 2 Eq. Ca. Ab. 363. pl. 12. *A.* on his marriage assigns a term for 1,000 years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of the bodies of the husband and wife, remainder to the husband's right heirs; the wife dies leaving issue; the whole term vests in the husband and he may assign it. (1)

EDWARD Webb the defendant's grandfather and his trustees, in consideration of a marriage between *Thomas* his son, and *Anne* his then wife, and 350*l.* portion, did assign divers lands in *Horsley* in *Gloucestershire* to trustees for the remainder of a term of 1000 years, upon trust to permit the son to enjoy the same so long as he should live; and after his decease, then to *Anne* his wife as long as she should live; and after their decease, to permit the heirs of the bodies of the said *Thomas* the son and *Anne* his wife to be begotten, to hold the premisses during the remainder of the term; and for want of such issue, to be enjoyed by the right heirs of the said *Thomas* the son.

(1) So *Atkinson* v. *Hutchinson*, post. Vol. III. 259. *Fereyes* v. *Robertson*, Bunb. 301. *Burford* v. *Lee*, 2 Free. 210. *Saltern* v. *Saltern*, 2 Atk. 376. *Pelham* v. *Gregory*, 5 Bro. P. C. 435. *Theebridge* v. *Kilburne*, 2 Vez. 236. *Garth* v. *Baldwin*, 2 Vez. 646—660. *Doe* v. *Lyde*, 1 T. R. 593. But this may be otherwise upon the apparent intent of a testator. *Clare* v. *Clare*, Ca. temp. Talb. 21. *Hodgson* v. *Bussey*, 2 Atk. 89. (as to the ground of determination of which case, vide 2 Vez. 236. and 660.) *Withers* v. *Algood* (cited), 1 Vez. 150. *Sands* v. *Dixwell* (cited), 2 Vez. 652. All which are cases of chattels

Thomas and *Anne* had seven or eight children; and he, having survived his wife, and settled about two thirds of his estate on the defendant his eldest son, (to the value of about 1,100*l.*) and being indebted about 300*l.* made a mortgage of the premisses for securing that money; and in order thereunto, took out administration to the last surviving trustee; and afterwards assigned this term to the plaintiffs upon trust that they should sell the same, and in the first place pay off the mortgage; and then pay the remainder to his executors, to be disposed of by them for his younger children, as he should appoint by his will.

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After this he made his will, and the plaintiffs *Baker* and *Seager, &c.* executors, and shortly after died.

The plaintiffs the trustees and executors, being disturbed by the defendant, brought their bill for the execution of the said trust and will.

The defendant by his answer set forth the first deed of trust, and insisted, that he, as eldest son and heir of his said father and mother, was entitled to the premisses by virtue of that settlement, and that he ought to have the same, notwithstanding his father's mortgage, assignment, and will.

The cause was heard before the Master of the Rolls, who dismissed the plaintiff's bill.

But upon petition to the Lord Keeper, it was reheard by him, who took time to consider of it; and this day being appointed for judgment, Mr. *Vernon* (who was absent at the rehearing by reason of sickness) was heard for the defendant:

And insisted strongly, that this case was exactly the same as that of (*a*) *Peacock* and *Spooner*, where a term for years was assigned in trust for one for life, remainder to the heirs of his body; which cause was heard before Lord Chancellor *Jeffereys* in 1688, who was of opinion, that the tenant for life had the whole term, and decreed accordingly; but afterwards coming on to be reheard before the Lords Commissioners, (*b*) they took it that the words [heirs of the body] were a description of the person who was intended to take, and reversed Lord *Jefferey*'s decree; and upon an appeal to the House of Lords, the Commissioners' decree was affirmed. (1)

(*a*) 2 Vern. 43.

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(*b*) 2 Vern. 195.

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real. As to the like limitations of chattels *personal*, vide post. 290. *Seale* v. *Seale*. Whether there shall be any difference in the effect of limitations of chattels *real* and *personal*, vide post 665. and *Beauclerk* v. *Dormer*, 2 Atk. 312. 314.

(1) So *Dafforne* v. *Goodman*, 2 Vern. 362.

WEBB v. WEBB.

(a) 2 Vern. 23.

Also in the case of *Ward* v. *Bradley*,(a) the trusts of a term were limited to *Cole* for ninety-nine years, if he should so long live, remainder to the heirs of his body begotten on his wife; *Cole* disposed of the whole term, and died leaving children, who brought their bill, and had a decree in their favour.

Sir *Joseph Jekyll* for the plaintiffs: The rule in equity is the same, as to the trust of a term, as it is at law in cases of a freehold; so that wherever, upon a limitation of a freehold, a man by a fine or recovery can bar his issue, if there is the same limitation of the trust of a term, in that case also the party may dispose of the whole term.

There is a great difference between our case and that of *Peacock* v. *Spooner*; in that case the limitation was for so many years as the man should live, and then to his wife in the same manner, then to the heirs of the body of the wife begotten by the husband; now this was the estate of the husband, and was a settlement made by him, and therefore it was considered as in the case of a freehold (*b*) upon the statute of H. 7. ca. 20. for preventing women's aliening the estates of their husbands after their deaths: for there the wife, with a second husband, was endeavouring to defeat the children of the first husband; and this was a great ingredient in the case to induce the Lords to go so far.

(b) Vide post. Hayter v. Rod, 370. (z)

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Lord Keeper: I never heard it said, before the case of *Peacock* v. *Spooner*, that the limitations of a term in equity differed from the case of a freehold at common law.

That case is the only one which in any manner resembles this; but as it seems far from being exactly parallel, I do not think myself tied up by it. (1)

Now that case differs from this in several material circumstances:

1*st*, The limitation there, was to the heirs of the body of the wife; here to the heirs of the bodies of the husband and wife.

2*dly*, There the party had not the legal estate, but the second husband took out administration to the first, and imagining that he had a right to the whole term, brought his bill against the trustees to compel them to assign.

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(1) So as to the authority of *Peacock* v. *Spooner*, vide (*y*) 2 Vez. 237 and 660.

(*z*) *Davis* v. *Gibbs*, post. Vol. III. 31. (*y*) 1 Vez. 135.

In the case before me, the party aliening has the legal estate.

3*dly*, In that case there was no disposition;

Here is a mortgage and disposition for younger children, which, were the plaintiffs not to prevail, must be defeated;

And therefore, there being these material variations between the one case and the other, I think I am at liberty to determine this as if the case of *Peacock* v. *Spooner* was out of the way. I am sure I have often heard it said by this court, that the case of *Lady Radnor* v. *Vandebendy*, was of a purchaser; (*a*) and that in any case which varied from it, as where there was no purchaser, they would vary too.

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(*a*) Ante, 111.

The decree at the Rolls must be reversed; and the trustees be let into a redemption of the mortgage, and be decreed to perform the trusts.

It seems in this case there were 40*l.* given the defendant by his father's will, on condition that he did not disturb the trustees, and they coming now to have an execution of the trust, and that he might either join with them in a sale, or lose his legacy:

Per cur': If he will join with them, he shall have the 40*l.* legacy: if not, then he shall forfeit it.

Father gives his son 40*l.* upon condition that he does not disturb his trustee; on the trustee's applying for an execution of the trust, son decreed either to join in a sale of the premisses, or else to forfeit his 40*l.* legacy. (1)

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(1) For this is merely a case of *election* arising upon an *express* condition, in which a legatee shall not be permitted to claim, *at the same time*, *under* the will and *against* it, as in *Boughton* v. *Boughton*, 2 Vez. 12. *Popham* v. *Taylor*, 1 Bro. C. C. 168. *Newman* v. *Newman*, 1 Bro. C. C. 186. and as hath been repeatedly determined upon *implied* conditions in *Noys* v. *Mordaunt*, 2 Vern. 581. *Streatfield* v. *Streatfield*, Ca. temp. Tal. 176. *Unett* v. *Wilkes*, Amb. 430. (*z*) *Frank* v. *Standish*, 1 Bro. C. C. 588. *Macnamara* v. *Jones*, 1 Bro. C. C. 481. &c. &c. But a condition that a legatee shall not dispute the will, &c. being considered as *in terrorem*, shall be relieved against; and therefore, a legatee shall not, by *having disputed* the validity or effect of a will, forfeit his legacy, when such will afterwards becomes established, or the effect of it ascertained. *Powell* v. *Morgan*, 2 Ver. 90. *Spillet* v. *Lloyd*, post. Vol. III. 344. *Morris* v. *Burroughs*, 1 Atk. 404. *Popham* v. *Taylor*, ub. sup. Unless the legacy be given over upon breach of such condition, as in *Cleaver* v. *Spurling*, post. Vol. II. 528. (*y*)

(*z*) 2 Eden, 187. S. C.

(*y*) See *Dillon* v. *Parker*, *Gretton*, v. *Haward*, 1 Swans. 359, 409, in the notes to which the cases on the subject of election are collected, and the subject is ably considered: and see *Gardiner* v. *Fell*, 1 J. and W. 22. *Butcher* v. *Kemp*, 5 Mad. 61.

Case 36. LADY WILLIAMS, Relict of Sir William Williams, *versus* SIR BOURCHIER WRAY. On a Bill of Review.

Lord Keeper Harcourt.

1 Eq. Ca. Ab. 219. pl. 4. Pre. Cha. 151. 2 Vern. 378. Dower allowed, though there was a trust-term subsisting. (1)

THE plaintiff brought a writ of dower, and recovered judgment by default; the defendant Sir *B. Wray* preferred his bill to be relieved against the judgment in dower, on this equity, (*viz.*) that as to the part of the lands (the five parishes in the pleadings mentioned), though the plaintiff the Lady *Williams* had recovered judgment in dower, yet there was a subsisting term for ninety-nine years in these lands, prior to her marriage; and that the legal estate of this term was in one Mr. *Bulkley*, as a collateral security for his quiet enjoyment of certain lands called *Lecquidissa;* that subject to this collateral security, the term was declared in trust to attend the reversion and inheritance which was in Sir *William Williams* the plaintiff's late husband; and that Sir *William Williams* being thus seised, and having intermarried with the plaintiff, did by his will, devise these lands to Sir *B. Wray* for life, remainder to his first and every other son in tail male, with remainder to his brother Mr. *Chichester Wray* in like manner, with remainder in fee-simple to the late King *William*, and that the said Mr. *Bulkley* having been interrupted in the enjoyment of the *Lecquidissa* estate, was decreed to have satisfaction out of the ninety-nine years' term of the land in the five parishes.

(*a*) Pre. Cha. 151.

28 *June* 1700. (*a*) This cause was heard before the Lord Keeper *Wright*, who declared, that the now plaintiff the Lady *Williams* was not dowable of these lands in the five parishes,

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there being a trust-term subsisting in them, prior to her marriage; and that equity would not aid a dowress; for that no dower ought to be of a trust, and if not of a trust in fee-simple, by the same reason, the plaintiff was not to be aided against a trust-term: wherefore he decreed Mr. *Bulkley*, to produce the deed at a trial at law, to enable Sir *B. Wray* to recover the possession of these lands in the five parishes, and that the

(1) So Lady *Dudley* v. Lord *Dudley*, Vol. II. 707. *Hill* v. *Adams*, 2 Atk. Pre. Cha. 241. *Banks* v. *Sutton*, post. 209. (*z*)

(*z*) *Secùs*, as to an equity of redemption, *Dixon* v. *Saville*, 1 Bro. C. C. 326.

now plaintiff the Lady *Williams* should account for the profits thereof.

LADY WILLIAMS *v.* SIR BOURCHIER WRAY.

21 *March* 1701. Upon the rehearing of this cause before the Lord Keeper *Wright*, and upon deliberation and time taken to consider of it, and on perusal of the bill, which was left with his Lordship, he affirmed his former decree. (*z*)

At the rehearing, the now plaintiff the Lady *Williams*'s counsel cited (*inter al'*) the cases of *Porter* v. *Hammond*, *Snell* (*a*) v. *Clay*, *Pemberton*, v. *Jarvell;* and insisted, that Sir *Bourchier* who was but a volunteer, should not, in equity, be relieved against a dowress; and that this case was different from that of Lady *Radnor* and *Vandebendy*, (*b*) affirmed in the House of Peers, in regard *Vandebendy* was a purchaser; also that here, if the judgment in dower was irregular, Sir *B.* ought to proceed and reverse it at law.

(*a*) 2 Vern. 324.

(*b*) Parl. Ca. 69.

To which it was answered, that if Lady *Williams* had been plaintiff in the original bill in equity, she could not have been relieved; forasmuch as the ninety-nine years' term must have subsisted, as well for the benefit of the devisee, as of the heir at law. That this was the same, in reason, with the Lady *Radnor*'s case, and that the term of ninety-nine years was prior to the marriage, and so the husband only seised of the reversion in fee during the coverture; that as to *Vandebendy*'s being a purchaser, he was so with full notice of dower, and got in the term to protect him against the dowress; and therefore, having notice, was to be consider'd only as a volunteer; that in dower, where the husband was seised of the reversion in fee expectant upon a term for years, the plaintiff might indeed (*c*) recover judgment, but the writ of seisin was not to be awarded until the term ended.

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(*c*) The plaintiff recovers, but there is a cesset executio during the term. Salk. 291. et vide ante, 121.

That Sir *Bourchier* was proper in equity; for without the assistance of this court he could not go to law, not having the deed, which was in the possession of his trustee Mr. *Bulkley;* and that if Mr. *Bulkley* had brought an ejectment, he must have recovered against the plaintiff the Lady *Williams;* and if he must have recovered, who was Sir *Bourchier*'s trustee, it was surely no less reasonable, that Sir *Bourchier* the *cestuique trust* should recover.

After this re-hearing, proceedings from time to time were had before the Master, who, at length, settled an account of

(*z*) See *Maundrel* v. *Maundrel*, 7 Ves. 580.

LADY WILLIAMS *v.* SIR BOURCHIER WRAY.

the profits taken by Lady *Williams* at 1438*l*, and that report, after exceptions taken to it, was confirmed.

But now Lady *Williams* brought her (*a*) bill of review; and on solemn argument before Lord Keeper *Harcourt*, he reversed Lord *Wright*'s decree; and ordered that the plaintiff Lady *Williams* having recovered dower at law, this trust-term that Sir *B. Wray* had set up, should not stand in her way in equity.

(*a*) It appears there was first a demurrer put in to this bill of review, which being overruled, the defendant submitted, and a decree was made by consent, fixing a sum for the arrears of dower, and delivering up the possession to the plaintiff. Vide post. the argument of the Master of the Rolls (Sir Joseph Jekyll) in the case of Banks v. Sutton, Vol. II. 700.

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DE TERM. PASCHÆ, 1711.

CASE 37.

BROWN *versus* LITTON.

LORD KEEPER HARCOURT.

10 Mod. 20. 2 Eq. Ca. Ab. 5 pl. 5. 722. pl. 2. Captain of a ship dies leaving money on board, the mate becomes captain and improves the money, he shall, on allowance (*z*) made him for his care in the management of such money, account for the profits, and not the interest only.

THE plaintiff's testator was captain of a ship, and being in his voyage beyond sea, had 800 dollars on board the ship, which he intended to invest in trade; the captain died, and the defendant (who was mate of the ship) becoming captain, took these 800 dollars, and investing them in trade made great improvements thereof; but on his return to *England*,

The executrix of the first captain brings a bill against him for an account.

The defendant admitted the receipt of the money, and offered to repay the same with interest; whereas the plaintiff insisted on the profits produced in trade, and the several investments that had been made therewith.

(*z*) *Ex parte Ormsby*, 1 Ba. and Be. 189. *Freeman* v. *Fairlie*, 3 Mer. 24.

Object. The defendant having traded with this money, it was at his risk and peril; and as, had it been lost in trade, the defendant must have borne that loss; so it is reasonable, on the other hand, that the profit which has been made of it should belong to him; as where an executor puts out money without the decree of the court, if this be lost, it is at his peril, and therefore he ought to have the interest.

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Where an executor puts out money, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, he is not (*x*) accountable for the loss, any more than he would have been entitled to the profits had it continued good.

But Lord Keeper said, that the case of an executor's putting out money without the indemnity of a decree, if it were on a real security, and one that there was no ground at that time to suspect, had not been settled; (*z*) though it was his opinion, that the executor under such circumstances, was not liable to answer for the loss, and so should account for the interest. (*y*)

But that he took the defendant, in this case, to be more like a trustee than an executor, and if so, he ought clearly to account for the profits made of the money; that the primary intent in carrying abroad this money was, to invest it in trade, and not to return with it home again; and therefore, the defendant having observed the intent of the testator in trading therewith, and having taken such a prudent care in the management of it, as (it might be presumed) he would have taken of his own money, his Lordship apprehended the defendant would not have been liable to answer for any loss that might have happened; and compared it to the case of two joint traders, where, if one dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade. (*u*) The court ob-

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(*z*) But an executor cannot lend money upon personal security, *Holmes* v. *Dring*, 2 Cox 1. *Wilkes* v. *Steward*, Coop. 6. *Harden* v. *Parsons*, 1 Eden 150. *Vigrass* v. *Binfield*, 3 Mad. 62. *Walker* v. *Symonds*, 3 Swan. 63. *Ryder* v. *Bickerton*, ib. 80. n. *Adye* v. *Feuilleteau*, ib. 84. n. S. C. 1 Cox 24.

(*y*) It is now settled that an executor who uses his testator's money, though he is answerable for the loss, if any, shall account for the profits he makes, or for the interest of the money, at the option of the legatees, *Piety* v. *Stace*, 4 Ves. 620. *Pocock* v. *Reddington*, 5 Ves. 794. *Rocke* v. *Hart*, 11 Ves. 58. *Heathcote* v. *Hulme*, 1 J. and W. 122. And see *Treves* v. *Townsend*, 1 Cox 50, 1 Bro. C. C. 384. S. C. *Raphael* v. *Boehm*, 11 Ves. 92. 13 Ves. 407. 590. *Tebbs* v. *Carpenter*, 1 Mad. 290.

(*x*) As to the rule at law, see *Crosse* v. *Smith*, 7 East 252. and see *Fellows* v. *Mitchell*, ante, 81.

(*u*) *Contrà*, *Hammond* v. *Douglas*, 5 Ves. 539. *Farr* v. *Pearce*, 3 Mad. 74. unless carried on with the partnership stock, *Crawshay* v. *Collins*, 15 Ves. 227. And see *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298. *Cruttwell* v. *Lye*, ib. 335. *Harrison* v. *Gardiner*, 2 Mad. 198.

BROWN v. LITTON.

served, that this being an island, all imaginable encouragement ought to be given to trade, and such construction was for the benefit of him who carried out this money with that intent; and there was no reason that his death should so far
[142] injure his family and relations, as to deprive them of the benefit which might accrue from it in the way of trade. But that, to recompense the defendant for his care in trading with it, the Master should settle a proper salary for the pains and trouble he had been at in the management thereof; and in the mean time costs to be reserved. (1)

(1) Reg. Lib. A. 1710. fol. 660.

CASE 38.

BALE *versus* COLEMAN.

LORD KEEPER HARCOURT.

2 Vern. 670. 2 Eq. Ca. Abr. 309. pl. 14. (2) 472. pl. 1. One devises his lands for payment of his debts, and then to *A.* for life, with power to make leases, &c. remainder to the heirs male of the body of *A.* though this be but the devise of a trust, and executory, and expressed to be to *A.* for life, yet it is an estate-tail in *A.* barrable by a fine and recovery. (3) Secus in case of marriage articles to settle an estate on *A.* for life, remainder to the heirs male of his body; this being an agreement to do a future act, and in which the issue are particularly considered and looked upon as purchasers.

ONE devised lands to four persons and their heirs for payment of debts, and afterwards to the use of them and their heirs, after which, by a codicil he devised, that his will should stand, saving, that when his debts were paid, *A.* who was one of the four devisees in the will, should have his share of the lands to himself for life, with a power to make leases for ninety-nine years, determinable on three lives, remainder to the heirs male of his body, remainder over.

(2) In 2 Eq. Ca. Ab. 309. pl. 14. this case is stated very much at large, and in 1 Vez. 151. Lord *Hardwicke* states it from the Register's books and examines it fully.

(3) The principal cases on limitations of this nature are the following. 1st, Where they have given *equitable* estates of inheritance, *Sweetapple* v. *Bindon*, 2 Vern. 536. *Legate* v. *Sewell*, ante, 87. and 1 Eq. Ca. Ab. 394. pl. 7. S. C. *Shaw* v. *Weigh*, 1 Eq. Ca. Ab. 184. pl. 28. and 3 Bro. P. C. 467. S. C. *Garth* v. *Baldwin*, 2 Vez. 646. *Wright* v. *Pearson*, Fearn. Cont. Rem. 4th edit. 187. and Amb. 358. S. C. (*z*) *Austen* v. *Taylor*, Amb. 376. (*y*) *Jones* v. *Morgan*, 1 Bro.

(*z*) 1 Eden 119. S. C.

(*y*) 1 Eden 361. S. C.

A. levied a fine and suffered a common recovery to the use of himself and his heirs, and brought a bill for a partition, BALE *v.* COLEMAN.

C. C. 206. (*z*) 2dly, Where an *equitable* estate for *life* only, *Leonard* v. *Earl of Sussex*, 2 Vern. 526. *Earl of Stamford* v. *Sir J. Hobart*, 1 Bro. P. C. 288. *Attorney General* v. *Sutton*, post. 766. *Papillon* v. *Voice*, post. Vol. II. 471. *Lord Glenorchy* v. *Bosville*, Ca. temp. Talb. 3. *Roberts* v. *Dixwell*, 1 Atk. 607. *Meure* v. *Meure*, 2 Atk. 265. *Bagshaw* v. *Spencer*, 2 Atk. 570. 577. and 1 Vez. 142. S. C. *Ashton* v. *Ashton* (cited), 1 Vez. 149. *White* v. *Carter*, Amb. 670. (*y*) *Bastard* v. *Proby* (*x*), (as to the distinction between trusts *executed* and *executory*, vide principally *Lord Glenorchy* v. *Bosville*, *Roberts* v. *Dixwell*, *Wright* v. *Pearson*, *Austen* v. *Taylor*, *White* v. *Carter*, ub. sup. and *Bagshaw* v. *Spencer*, 1 Vez. 152.) (*v*) 3dly, Where a *legal* estate of *inheritance*. *King* v. *Melling*, 1 Vent. 225. *Legate* v. *Sewell*, ub. sup. *Broughton* v. *Langley*, 2 Lord Raym. 873. and 2 Salk. 679. S. C. *Attorney General* v. *Sutton*, post. 754. *Miller* v. *Seagrave*, Rob. Gavelk. 96. *Goodright* v. *Pullyn*, 2 Lord Raym. 1437. *Papillon* v. *Voice*, ub. sup. *Morris* v. *Le Gay* (cited), 2 Burr. 1102. *Dubber* v. *Trollop*, Amb. 453. *Minshull* v. *Minshull*, 1 Atk. 411. *Colson* v. *Colson*, 2 Atk. 246. *Roe* v. *Grew*, 2 Wils. 322. *Sayer* v. *Masterman*, Fearne's Cont. Rem. 4th edit. 250. and Amb. 344. S. C. *King* v. *Burchell*, Amb. 379. and 4 T. R. 496. note, S. C. (*u*) *University of Oxford* v. *Clifton*, Amb. 385. (*t*) *Hodgson* v. *Ambrose*, Doug. 323. (*s*) 4thly, Where a *legal* estate for *life* only. *Archer's* Case, 1 Rep. 66. *Luddington* v. *Kime*, 1 Lord Raym. 203. *Lisle* v. *Gray*, Raym. 278. *Law* v. *Davies*, 2 Lord Raym. 1561. *Doe* v. *Laming*, 2 Burr. 1100. *Perrin* v. *Blake*, 4 Burr. 2579. Doug. 343. note 3. and Harg. Law Tracts, 489. S. C. *Roe* v. *Collis*, 4 T. R. 294. (*r*) With respect to the operation of the word "issue," vide particularly *Backhouse* v. *Wells*, 1 Eq. Ca. Ab. 184. pl. 27. *Luddington* v. *Kime*, *Meure* v. *Meure*, *Ashton* v. *Ashton*, *Goodtitle* v. *Otway*, 2 Wils. 6. *Roe* v. *Collis*, ub. sup. (*q*) For the result of these cases,

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(*z*) *Poole* v. *Poole*, 1 Bos. & Pull. 620. *Brydges* v. *Brydges*, 3 Ves. 120. *Elton* v. *Eason*, 19 Ves. 73. *Green* v. *Staples*, 5 Mad. 85.

(*y*) 2 Eden, 366. S. C.

(*x*) 2 Cox 6. *Macnamara* v. *Whitworth*, Coop. 241. *Merest* v. *James*, 1 Bro. & Bin. 484. 4 Ba. Moor. 327. S. C. *Murthwaite* v. *Barnard*, 2 Bro. & Bin. 623. and 6 Ba. Moor. 13 S. C.

(*v*) *Newcastle* v. *Lincoln*, 3 Ves. 387. 12 Ves. 287. S. C. *Green* v. *Stephens*, 17 Ves. 64. *Blackburn* v. *Stables*, 2 V. & B. 369. *Jervoise* v. *Northumberland*, 1 J. & W. 559.

(*u*) 1 Eden, 424. S. C.

(*t*) 1 Eden, 473. S. C.

(*s*) *Doe* v. *Aplin*, 4 T. R. 82. *Denn* v. *Puckey*, 5 T. R. 299. *Doe* v. *Smith*, 7 T. R. 531. *Doe* v. *Cooper*, 1 East. 229. *Frank* v. *Stovin*, 3 East. 548. *Pierson* v. *Vickers*, 5 East, 548. *Seale* v. *Barter*, 2 Bos. & Pull. 485. *Doe* v. *Goldsmith*, 2 Marsh. 517. 7 Taun. 209. S. C. *Roe* v. *Bedford*, 4 M. & S. 362. *Bennet* v. *Tankervile*, 19 Ves. 170. *Brouncker* v. *Bagot*, ib. 574. *Doe* v. *Jesson*, 5 M. & S. 95. reversed Dom. Proc. 2 Bligh, 2. *Measure* v. *Gee*, ib. 910.

(*r*) *Hockley* v. *Mawbey*, 1 Ves. jun. 143. 3 Bro. C. C. 82. S. C. *Doe* v. *Mulgrave*, 5 T. R. 320. *Doe* v. *Burnsall*, 6 T. R. 30. *Burnsall* v. *Davy*, 1 Bos. & Pull. 215. *Denn* v. *Bagshaw*, 6 T. R. 512. *Doe* v. *Halley*, 8 T. R. 5. *Goodtitle* v. *Herring*, 1 East, 264. *Seaward* v. *Willock*, 5 East. 198. *Doe* v. *Goff*, 11 East 668. *Gretton* v. *Haward*, 2 Marsh. 9. 6 Taun. 94. 1 Mer. 448. S. C. *Smith* v. *Horlock*, 2 Marsh. 405. 1 Bro. & Bin. 123. S. C. *Doe* v. *Vaughan*, 5 B. & A. 464.

(*q*) *King* v. *Burchell*, 1 Eden 424. *Murthwaite* v. *Barnard*, 2 Bro. & Bin 623. 6 B. Moor, 327.

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praying that the other three might join in a conveyance of a divided fourth part to him in fee.

(a) 26 July, 1709.

And this coming to be heard by Lord Chancellor (a) *Cowper*, and the only question being, whether by the codicil *A.* was intitled to an estate in tail, or for life only?

His Lordship was of opinion *A.* ought to be tenant for life only, with remainder to his first, &c. son in tail male, with remainder over; for that it being the case of a will, and an

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express estate for life being limited to *A.* remainder to the heirs male of his body, it differed (as he conceived) from an immediate devise; that it was rather to be looked upon as an executory devise, to take effect after debts paid, which debts were considerable; or in nature of marriage articles for the conveying and settling an estate to one for life, with remainder to the heirs male of his body; in which case, it had been often decreed, that the conveyance or settlement should not be made pursuant to the words, but the intention of the parties, (*scil.*) to *A.* for life, remainder to the first, &c. son in tail male successively; that it would cross and frustrate the intent of the testator, to impower *A.* to bar his issue and the remainderman; besides, that the enabling of *A.* to make leases, seemed to imply very strongly that he was to have no power to dispose of the inheritance.

(b) 28 April.

But the same cause coming on (b) this day before Lord Keeper *Harcourt*, on a re-hearing, it was urged against the decree, by *Powis*, Queen's Serjeant, and *Northey* Attorney-General,

First, That if the case were only of a devise of lands to one for life, remainder to the heirs male of his body, this plainly would be an estate-tail; and if it would be so at law, it must be highly inconvenient that the limitation of lands in the very same words, and by the same will, should be construed to

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vide Fearn. Cont. Rem. 290. Harg. Law Tracts, 551. Harg. and Butl. Co. Litt. 376. b. note 1. (z)

(z) In all these cases in which the subsequent limitation to the heirs has been held to coalesce with the preceding freehold given to the ancestor, so as to enlarge his estate, both estates were of the same description, viz. both legal, or both equitable; but an equitable freehold will not unite with a legal estate of inheritance, *Tippen* v. *Cosen*, Carth. 272. 4 Mod. 380. S. C. *Shapland* v. *Smith*, 1 Bro. C. C. 75. *Silvester* v. *Wilson*, 2 T. R. 444. *Ireson* v. *Pearman*, 3 B. & C. 799.; nor a legal freehold with an equitable estate of inheritance, *Venables* v. *Morris*, 7 T. R. 342. 438.

give one kind of estate in one court, on one side of *Westminster-Hall*, and to create a different kind of estate in another court, on the other side of *Westminster-Hall:* That the Lord Chancellor *Nottingham*, in the Duke of *Norfolk*'s case, had laid it down as a maxim, that (*a*) trusts should be construed by the same rules as legal estates.

(*a*) Vide ante, 35. 109.

Secondly, That it was not material what the intention of the party was in this case, if that intention was contrary to the plain rules of law: and it was a plain rule of law, that if an estate was limited to one for life, with remainder to the heirs (or heirs male) of his body, this was an estate-tail executed.

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Thirdly, That the case of *King* v. *Melling* in 2 Lev. 58. and 3 Keb. 42 &c. was much stronger; where an estate was devised to one for life, with remainder to the issue of his body; yet this was adjudged an estate-tail; though the word *issue* was a much more improper word to convey an inheritance, than the word *heirs*.

Devise to one for life, remainder to the issue of his body, is an estate-tail.

Fourthly, That the power to make leases did not restrain the estate to be but an estate for life. In *King* v. *Melling* there was a power to the devisee for life to make a jointure, notwithstanding which, the remainder limited to the issue of his body made it an estate-tail; and Mr. Attorney-General *Northey* said, that he had known very eminent men give that power even to a tenant in tail, and it had its use, in regard that by the statute of H. 8. the power of leasing given to tenant in tail would bind only the (*b*) issue, and not the remainder or reversion; but now by this express power, the leases made in pursuance thereof would bind the remainder or reversion, as well as the issue; so that such power went further than the power given by the statute, and might be of service, to prevent the breaking into the estate-tail by a fine and recovery.

A power of making leases does not prevent the devisee's estate from being an estate-tail; for by this power the devisee without fine or recovery may make leases to bind the remainder or reversion; whereas by the statute of H. 8. tenant in tail can only make leases to bar the issue, and not the remainder or reversion.

(*b*) 1 Inst. 44.

Fifthly, As to the objection, that this was a devise executory and not executed, it being to take effect after debts paid; it was answered, that supposing the debts were not then paid, yet whenever they should be paid, it would be the same thing as if no such debts had been, and consequently as a present devise. And Sir *Thomas Powis* very much insisted upon the case of (*a*) *Legate* v. *Sewell*, where money was devised to be laid out in land, and to be settled on a man for life, remainder to the heirs male of his body, and the heirs male of the body of every such heir male successively, which case was sent by the Lord Chancellor *Cowper* to the judges of *C. B.* to

(*c*) Ante, 87.

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determine what estate this would have been, in case it had been a devise of land; and it was adjudged an estate-tail.

Lord Keeper *Harcourt:* This being the case of a will, differs from the several cases that have been cited of marriage articles, in the nature of which the issue are particularly considered, and looked upon as purchasers; and for which reason, the court has restrained the general expressions made use of by the parties (1); for it cannot reasonably be supposed that a valuable consideration would be given for the settlement of an estate, which, as soon as settled, the husband might destroy: but no case has been cited where, upon the words of a will, or the parties claim voluntarily, the like decree has been made. In all such cases, the testator's intent must be presumed to be consistent with the rules of law; and at law these words would certainly create an entail; neither can it be inferred (with any certainty) from the power of leasing given by the testator, that no estate-tail was intended; in regard such power of leasing is more beneficial than that given to tenant in tail by statute. And as the debts are admitted by the pleadings to be all paid, the same construction is now to be made, as if there had been originally no trust.

So decree *A.*'s share or fourth part to be conveyed to him and the heirs male of his body, remainder over, &c. that being thought more proper by the plaintiff's counsel than an estate in fee.

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(1) Vide *Honor* v. *Honor*, ante, 123. *Trevor*, post. 622. *West* v. *Erisey*, *Seale* v. *Seale*, post. 291. *Trevor* v. post. Vol. II. 349.

Russ. & Myl. 263.
Eq. 239.

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DE TERM. S. TRINITATIS, 1711.

CASE 39.

SIR THOMAS MEERS *versus* LORD STOURTON, *et è contra.*

2 Eq. Ca. Ab. 14. pl. 4.
1 Dick. 21.
A peer of the realm is to put in his answer upon honour, but his answer to interrogatories, and examination as a witness, must be on oath.

SIR *Thomas Meers* brought a bill v. Lord *Stourton* to foreclose him: and Lord *Stourton* brought his bill v. Sir *Thomas Meers*, to compel him to a specific performance of articles for the pur-

chasing of Lord *Stourton*'s estate. Sir *Thomas* in his defence insisted that there were defects in Lord *Stourton*'s title to the estate; and it being at length ordered that the Lord *Stourton* should be examined on interrogatories touching his said title, it was objected, that the Lord *Stourton* being a peer of the realm, ought to answer upon *honour* only.

SIR THOMAS MEERS v. LORD STOURTON.

On the other side it was answered, and so ruled by Lord Keeper *Harcourt*, that though the privilege of peerage did allow a peer to put in his *answer* upon *honour only*, yet this was restrained to an *answer*; and that as to all *affidavits*, or where a peer is examined as a witness, he must be upon his oath; and that this examination upon interrogatories, being in a cause wherein his lordship was plaintiff to enforce the execution of an agreement; as his lordship would have equity, so he should do equity, and allow the other side the benefit of a discovery, and *that in a legal manner*; and so ordered, that the Lord *Stourton* should put in his examination upon oath.

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KATHERINE COPLEY, AN INFANT, *versus* LYONEL COPLEY.

CASE 40.

THE plaintiff was the only daughter and heir of Sir *Godfrey Copley*, her deceased father, and grandchild and heir of *Godfrey Copley*, her deceased grandfather.

LORD KEEPER HARCOURT.

2 Eq. Ca. Ab. 639. pl. 4.

A man has one daughter, to whom 8,000*l.* is secured by marriage settlement; and afterwards he gives her 8,000*l.* by his will for her portion, and 200*l.* per annum. The daughter shall have but one 8,000*l.* though she may elect which of the portions she pleases.

In 1654, *Godfrey Copley*, the grandfather, settled his (1) estate upon himself for life, remainder to his first &c. son in tail, with a proviso, that if his son (afterwards Sir *Godfrey*) should die without issue male, and leaving a daughter, the trus-

(1) The particulars of the settlement of 1654, do not appear in Reg. Lib. it being only stated generally, that such a provision, and payable as above-mentioned, was thereby made for an only daughter of Sir *Godfrey*. But two MSS. notes of this case agree in stating the proviso in that settlement to have been, that the settlor and all persons who should be seised thereunder "should "stand seised in trust to raise 5,000*l.* "for the daughter or daughters of Sir "*Godfrey*, in case of failure of issue "male," payable as above. At this time Sir *Godfrey* was not married.

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tees should raise out of part of the premisses 5000*l.* to be paid to such daughter, within a year after her marriage, or at her age of twenty-one, which should first happen; after which the said *Godfrey Copley* died.

In 1681, Sir *Godfrey Copley*, pursuant to articles on his marriage, settled (1) all the said estate (including the premisses charged with the 5000*l.*) on himself for life, remainder to his first, &c. son in tail male, remainder to trustees for 200 years, in trust to raise 8000*l.* for daughters' portions, (if no issue male) payable (2) at eighteen, if then married, or at any time after, when married. (3)

In 1709, Sir *Godfrey Copley*, having no issue male, by his will devised all his lands to his kinsman *Lyonel Copley*,

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(1) Previously to this settlement, Sir *Godfrey* was tenant in tail, with the immediate remainder to himself in fee; and he levied a fine for the purpose of making this settlement. *Catherine Copley* was the only child of this marriage, who survived her mother.

(2) The time of payment does not appear in Reg. Lib. but the circumstance of this portion *not* being payable unless the daughter married, was insisted upon in argument, as shewing that it could not be intended as a satisfaction for the former provision, which was *in all events* payable at 21.

(3) In 1700 Sir *Godfrey* married a second wife, and in the settlement made by him on his second marriage, he covenanted, that the premises were free from all incumbrances, except the 8000*l.* to be raised under the settlement of 1681. This was much insisted upon, both in the pleadings, and in argument, as shewing that Sir *Godfrey* intended this 8000*l.* as a satisfaction for the 5000*l.* There was no issue of the second marriage. Sir *Godfrey* by his will, in his own handwriting, after reciting that "he was in- "titled to divers manors, lands, &c. in "possession, reversion, and expectancy, "and that by some deeds or settlements "there were some powers reserved to him "of charging all or any part of the pre- "mises with divers sums of money for "the portions and maintenances of his "children, devised all his real and per- "sonal estates to trustees, upon trust, "out of his personal estate, and in aid "of his personal estate, if deficient, by "and out of the monies to be raised by "virtue of the said powers, and in aid "thereof, by and out of the rents and "profits of the said real estates, or by "lease or mortgage of a competent part "thereof, to raise sufficient to pay all his "debts, and in the next place, the main- "tenances, portions, and legacies by him "appointed and given; and after re- "citing that he had but one daughter by "his first marriage, in pursuance of all "such powers reserved to him, he willed "and appointed that his said daughter "*should have for her portion* 8000*l.*" payable as above-mentioned: and for maintenance of his said daughter, until she should receive *her said portion*, and as an addition thereto, he devised to her 80*l.* until 12 years of age, 100*l.* until 15, 150*l.* until 18, and then 200*l.* per ann. for her life, to be paid above *her said portion of* 8000*l.* (but in this will he took no notice of the settlement of 1681), and subject to these charges, the trustees were to stand seised of the premises in trust for the heirs male of his own body, remainder to *L. Copley*, in tail male, remainder to *Cath. Copley* for life, remainder to her first and other sons in tail, with several remainders over. Reg. Lib.—N. B. In this case parol evidence was offered of the testator's intention to give the last 8000*l.* as an *additional* provision; but the court would not hear it: as to this, vide post. Vol. II. 158.

the defendant in tail male, chargeable with his legacies, and devised to the plaintiff his daughter *Catherine for her portion* 8000*l.* (*viz.*) 4000*l.* part of it, to be paid her at her age of eighteen years, and 4000*l.* the residue of it, within a year after marriage, or, in all events at twenty-one; and devised to her 150*l. per annum*, until eighteen, and afterwards 200*l. per annum* for her life.

And now the plaintiff *Catherine*, brought her bill for the recovery of all these sums of 5000*l.* 8000*l.* and 8000*l.* insisting, that none of them being given in satisfaction of the other, and it being the case of an heir at law, and these sums payable at different times, some less beneficial than others; therefore all these portions, or at least the 5000*l.* given by the grandfather, and the 8000*l.* given by the father, should be paid to her.

Sed per cur': (1) The will says, that the 8000*l.* given thereby is for the plaintiff's *portion*, and this 8000l. and the annuity of 200*l. per annum* for her life, seem the most beneficial; but it is a hard demand in equity, when only *one* portion is intended the plaintiff, that she should be suing for *three*. Wherefore, forasmuch as the plaintiff has no remedy to recover any of her portions, but by the aid of a court of equity, she shall not recover more than was intended her. But the infant shall not by this decree be precluded from electing the portion by the marriage settlement, if she, when she comes of age, thinks that more for her advantage. However she shall not have two portions instead of one. (2)

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(1) The court first declared, "that "*Catherine Copley* was entitled to only "one portion and maintenance by virtue "of the said settlement by the grand-"father, settlement by the father, and "the will. Reg. Lib. A. 1710. fol. 597.

(2) Vide *Blois* v. *Blois*, 2 Cha. Rep. 162. *Jenkins* v. *Powell*, 2 Vern. 115. *Jesson* v. *Jesson*, ib. 255. *Thomas* v. *Kemish*, ib. 348. *Bruen* v. *Bruen*, ib. 439. *Herne* v. *Herne*, ib. 556. *Ward* v. *Lant*, Pre. Ch. 182. *Walpole* v. *Lord Conway*, Barnard. 153. *Bellasis* v. *Uthwaite*, 1 Atk. 427. *Farnham* v. *Phillips*, 2 Atk. 215. *Spinks* v. *Robins*, ib. 491. *Shudal* v. *Jekyll*, ib. 516. *Wood* v. *Briant*, ib. 521. *Clark* v. *Sewell*, 3 Atk. 98. *Johnson* v. *Smith*, 1 Vez. 314. *Barret* v. *Beckford*, ib. 520. *Alleyn* v. *Alleyn*, 2 Vez. 37. *Watson* v. *Earl of Lincoln*, Amb. 325. and 1 Bro. C. C. 65. note. *Jeacock* v. *Falkner*, (*z*) *Warren* v. *Warren*, (*y*) and *Acworth* v. *Acworth*, ib. 295. 305. 307. *Grave* v. *Earl of Salisbury*, ib. 425. *Holmes* v. *Holmes*, ib. 555. (*x*) *Debeze* v. *Mann*, 2 Bro. C. C. 165. 519. (*w*) *Powell* v. *Cleaver*, ib. 499. *Hanbury* v. *Hanbury*, ib. 352. 529. *Ellison* v. *Cookson*, ib. 307. and 3 Bro. C. C. 61. (*v*) *Baugh* v.

(*z*) 1 Cox, 37. S. C.
(*y*) 1 Cox, 41. S. C.
(*x*) 1 Cox, 39. S. C.
(*w*) 1 Cox, 346. S. C.
(*v*) 2 Cox, 220. 1 Ves. jun. 100. S. C.

CASE 41. TOMLINSON *versus* DIGHTON. (*y*) WRIT OF ERROR FROM A JUDGMENT IN C. B. ON A SPECIAL VERDICT IN EJECTMENT.

1. Russ. Mayl. 423.
9. Sim. 164.

Argument for the Defendant.

Salk. 239. 10 Mod. 31. Com. Rep. 194. 2 Eq. Ca. Ab. 309. pl. 12. Devise to *A.* the testator's wife for life, and then to be at her disposal, provided it be to any of his children, gives an estate for life, with a power to dispose of the fee. (*x*) And where such devisee with an after taken husband did by lease and release, and fine, convey the premisses to a trustee and his heirs, to the use of the wife for life, without impeachment of waste; remainder to her daughter by her first husband, and the heirs of her body, remainder to the son by her first husband and his heirs: this adjudged a good execution of the power.

THE case in short is but this;

John Tomlinson, seised in fee of the land in question, devises the premisses to his wife *Margaret* for her life, and then to be at her disposal, provided it be to any of his children, if living, if not, to any of his kindred that his wife shall please.

The testator dies leaving issue *William* and *Hester*; *Margaret* the testator's widow marries one *Simeon Sisson*, her second husband, and they two, by indentures of lease and release, reciting the testator's will, grant the premisses in question to trustees and their heirs, to the use of *Margaret* herself for her life, *sans* waste; remainder to the use of *Hester*, the testator's daughter, and the heirs of her body, remainder to the use of *William* the testator's son and his heirs, In the deed of release there is a covenant, that this *Sisson*, and *Margaret* his wife should levy a fine of the premisses to the uses abovementioned, which fine was accordingly levied.

[150] And the only question is, whether this lease and release, and fine, pass a good estate to *Hester*, and the heirs of her body, expectant upon her mother's death? if so, then she being dead, *Robert Carlisle*, the heir of her body, and lessor of the plaintiff, has a good title. And I humbly take it,

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Reed, ib. 192. As to cases of satisfaction or performance of an *actual contract*, vide *Blandy* v. *Widmore*, post. 324. (*z*)

(*z*) And see *Byde* v. *Byde*, 1 Cox 44. 2 Eden 19. S. C. *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516. *Sparkes* v. *Cator*, ib. 530. *Twisden* v. *Twisden*, 9 Ves. 413. *Bengough* v. *Walker*, 15 Ves. 507. *Onslow* v. *Michell*, 18 Ves. 490. which were cases of satisfaction. As to cases of ademption, see *Hartop* v. *Whitmore*, post. 681.

(*y*) See Sugd. Pow. 75.

(*x*) So *Nannock* v. *Horton*, 7 Ves. 391. *Reid* v. *Shergold*, 10 Ves. 370. but see *Goodtitle* v. *Otway*, 2 Wils. 6. *Elton* v. *Sheppard*, 1 Bro. C. C. 532.

here is a good estate conveyed to *Hester*, and the heirs of her body. TOMLINSON v. DIGHTON.

In this case I shall only make two points, first, What estate passes by this will to *Margaret* the testator's wife, whether a fee-simple, or only an estate for life, with a power to dispose of the fee to any of her first husband's children, or kindred? *Secondly*, Admitting that *Margaret* has but an estate for her life by the will, with a power to dispose of the premisses to any of her first husband's children, &c. whether she has well executed this power, in respect of her being, at that time, under coverture with her second husband, and (which is the chief question) in respect of the improper conveyance which she has made use of for this purpose. And, with submission, I take it, that the declaring or limiting the use by the release to *Hester* and the heirs of her body, expectant upon her mother's death, is a good appointment, and a good execution of the power.

As to the first question, I would beg leave to put it as a short case: A man seised in fee, devises his lands to his wife for her life, and then to be at her disposal, provided she disposes of the premisses to any of his children;

The question is, what estate the wife has by the will in this case?

And I think it might be reasonably insisted, that by this devise of the land to the wife for her life, *and then to be at her disposal*, she has a fee-simple. [151]

And that the following words [provided she disposes of the premisses to any of the testator's children,] annex a condition to this fee, and make it a conditional fee-simple, to be void, if the wife does not dispose of the premisses to some or one of her first husband's children.

As to the former words, if they were only thus, *I devise my lands to my wife, and to be at her disposal*, there could be no question, but this would be a fee-simple.

A devise of lands to one, to give and to sell, is a fee-simple. 1 Inst. 9. b. 1 Roll. Abr. 834. (7). The power of disposing and the power of selling, are the badges of absolute ownership; and therefore, where lands are devised to any one with these powers, the devisee has an absolute ownership, and that is a fee-simple.

It is true, that in this case, if there were not a devise of the lands to the wife, but only a devise that the wife might dispose of the land, this might give the wife a power only,

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and not an interest; like a devise that my executors shall sell my land, this only gives a power, and no estate, to my executors.

But if I devise my land to my executors to sell, this passes an estate to my executors, and that estate is a fee-simple. 1 Inst. 113. a. So in the principal case, the devise being of the land itself to the wife, *and to be at her disposal*, these words, if they went no farther, would pass a fee-simple to the wife.

But it is very true, here are afterwards restraining words in
[152] the will; which say, *I give my lands to my wife for life, and then to be at her disposal, provided she dispose of the premisses to any of my children;* which latter words, as I take it, annex a condition to this fee, and subject it to a forfeiture, if she does not dispose of the premisses to some or one of her first husband's children.

I shall beg leave to mention two cases, wherein are the like restrictive words with the principal case, and go a great way in proving it to be a fee-simple.

In Dalisson, 58. (*anonymous* case,) A man by his will devises land to his wife, to dispose and employ it upon herself and her son, at her will and pleasure; and held by *Dyer* C. J. *Weston* and *Walsh* justices, that the wife had a fee-simple; but yet the words [*to employ the premisses upon herself and her son,*] being in a will, make the fee-simple devised conditional only, so that if the wife should alien to a stranger, it would be a forfeiture.

So in the principal case, where the devise is of the lands to the wife *to be at her disposal*, provided she disposes of the same to any of his children, &c. the former words make a fee-simple, and the latter words restrain them to a conditional fee, that the wife shall not alien from the first husband's children, &c.

The other case is the case of *Daniel* and *Ubley*, reported 1 Jones, 137. Latch. 39. 134. Noy, 80. Bendl. 178. Where a man devises his lands to his wife to dispose at her will and pleasure, *and to give to such of my sons as she thinks best*; and by *Crew* C. J. *Whitlock* and *Doderidge*, against *Jones* J. it is
[153] resolved, the wife had a fee-simple in point of interest, and not a bare power only to dispose of the fee-simple. Which case comes very near our case.

I must agree, there is this, and this only difference, between the principal case and these two which I have cited; *viz.* that in the principal case now before the court, the will gives an

express estate for life to the wife, and afterwards the premisses are to be at her disposal. TOMLINSON v. DIGHTON.

But in the cases cited, no express estate for life is given to the devisee, only a devise of the lands to the wife in general, and she to dispose of them as she shall think fit; how far this difference may weigh with your Lordship, I submit. If by the devise of the lands to the wife to be at her disposal, a fee-simple passes, (as is plain from these authorities which I have cited), then a devise to the wife to be at her disposal, is equivalent to a devise to the wife and her heirs.

And if so, then I submit to your Lordship, whether it is not the same, as if the devise were to the wife for her life, remainder to her and her heirs, which would be a plain fee-simple; and if it be a fee-simple in the wife, then she and her second husband (*Sisson*) afterwards joining in the lease and release, and fine to the trustees, to the use of herself for life, with remainder to the use of her husband's daughter *Hester*, and the heirs of her body, this passes a plain estate-tail to *Hester*.

And then the wife and the daughter *Hester* being both dead, her son *Robert Carlisle*, the lessor of the plaintiff, has an undoubted title.

But, my Lord, I must admit there are two cases that are express authorities that the wife in the principal case has but an estate for life, with a power to dispose of the fee; and that these two cases do make this very difference, *viz.* where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee, but where lands are devised to one expressly for life, and afterwards to be at the devisee's disposal, (which is the case before your Lordship,) in this case only an estate for life passes to the devisee, with a bare power to dispose of the fee; for that (as it is said) words of implication shall not merge or destroy an (*a*) express estate for life. [154]

(*a*) Vide ante, 55. 78.

These cases are one of them in 3 Leo. 71. (*anonymous* case,) where *A.* seised in fee devises his lands to his wife for life, and after her death she to give the same to whom she will, and she by deed grants the reversion to a stranger in fee; resolved by the judges, that the wife had but an estate for life, with a power to dispose of the reversion in fee; for an express estate for life being given to the wife, she shall not, by implication, have any further estate, but only a power to dispose of the fee; but if an express estate for life had not been given to the wife,

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then the other words, [to give to whom she pleases,] would have vested in her the estate in fee, and not a bare power only.

The other case is in 1 Mod. 189. *Liefe* v. *Saltingstone*, reported shortly in 2 Lev. 104. by the name of Sir *Richard Saltonstall's* case, and in Carter, 232. Where one devised lands to his wife for life, and that she should dispose of them to such of the testator's children as she should think fit; [155] and by *Wyndham*, *Ellis* and *Atkins*, justices, against *Vaughan* C. J. the wife is adjudged to be tenant for life, with a power to dispose of the fee to any of her husband's children. And here in 1 Mod. the same difference is taken, *viz.* where an express estate for life is devised to the wife, there the subsequent words will only give a power, and not an estate, to merge and destroy the express limitation for life. Indeed, C. J. *Vaughan* is singular in his opinion in this case, by holding, that by these words the wife had a power of disposing of an estate for life only to the children; but the other three judges were against him, conceiving that a power by will to dispose of lands, or to sell lands, equally enables the devisee to pass the fee-simple; I shall therefore admit, upon the foot of these two authorities, that an express estate for life being devised to the wife, she has not an estate in fee, but an estate for life only, and a bare power to dispose of the fee.

And then, taking it that the testator's wife in this case has but an estate for her life, with a power only of disposing of the fee to any of her first husband's children, &c. The next question is, whether the wife marrying again with *Simon Sisson* her second husband, this, during her coverture, does not suspend her power of disposing of the fee to any of her first husband's children?

And as to this point, it seems very plain, that her subsequent marriage is no suspension of her power, because, whenever she executes the power, by disposing of the premisses to any of her first husband's children, such child, or appointee, is not in under her, but by the will of her first husband.

That this subsequent marriage is no suspension of the power, is expressly resolved in the case which I have men- [156] tioned of *Daniel* and *Ubley* in 1 Jo. 137. & Noy, 80. And there we may see a stronger case mentioned, which is, lands are devised to a woman, on condition that she should convey to *J. S.* and she afterwards marries; yet 'tis held that the woman, even during her coverture, may (to prevent the breach

of the condition) make a feoffment to *J. S.* though in that case, the estate and interest passes from the feme coverte; and there the feme coverte's feoffment is resembled to the case, where one grants an estate-tail to *A.* with remainder to *B.* in fee, on condition that *A.* the tenant in tail should grant a rent in fee to a third person; and resolved that the tenant in tail may grant this rent, which, when granted, shall bind both the issue in tail, and the remainder-man, because it is to save the estate from being forfeited; so to prevent the breach of the condition, a feme coverte shall be enabled to make a feoffment.

I shall only mention one case more on this head, and that is, one much stronger than the principal case, and which is pretty often mentioned in the books, 'tis in 1 Roll's Abr. 329. pl. 10. 10 H. 7. 20. & 1 Inst. 112. a. One seised in fee, devises that his wife shall sell his land, and dies, and the wife takes a second husband, and held, that the wife's power of selling, is not only subsisting, notwithstanding her second marriage, but that she may sell the land even to her second husband.

So that this seems extremely plain, that the wife's second marriage does not hinder her from executing her power. (1)

And now I am come to what I take to be the principal question in the case, and what (as I was informed) did chiefly stick with the court, which is, whether these deeds of lease and release did not amount to a good execution of the power? [157]

And as to this, the case is, the testator's widow is tenant for life, with a bare power to dispose of the premisses to any of her first husband's children, and the wife with a second husband grants the premisses by lease and release to the use of herself for life, remainder to the use of *Hester* her first husband's daughter, and the heirs of her body.

Whether this be a good execution of the power, is the question.

The objections against it have been, that this is a very improper method of doing it, the parties rather conveying an estate as owners, than executing a power.

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(1) Vide Harg. Co. Litt. 112. a. note 6. *Compton* v. *Collinson*, 2 Bro. C. C. 377. and 1 H. Bl. 334. (*z*)

(*z*) *Driver* v. *Thompson*, 4 Taun. 294.

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Also it was objected by Mr. *Lutwyche* (who argued for the plaintiff), that nothing by this conveyance is intended to pass, but what arises by way of use out of the legal estate conveyed to the trustees, which being (at most) but an estate for the life of the testator's wife, is not sufficient to afford an estate tail to *Hester*.

But, with submission, I shall endeavour to prove, both from the reason of the law, and also from authorities (which as I conceive come fully up to this point), that this indenture of release is a very good appointment, and a very effectual execution of the power.

It is an established rule, that in the case of deeds as well as wills, regard is to be had to the intent of the parties, and that a deed shall never be laid aside as void, if by any construction it can be made good.

[158] The Lord *Hobart* in his Reports (*fol.* 277.) takes notice, with due commendation to my lords the judges, that they are curious, and almost subtil, that they are *astuti* (as he terms it) to invent reasons and means to help and assist the just intent of the parties.

And whereas it has been said, that powers are to be taken strictly, the execution of this power shall be taken favourably, in regard, in notion of law, it is part of the testator's will, and the appointee is in under the will, and therefore this deed of release in this case, is intitled to the same favour, in the construction of it, as is due to the will to which it refers.

Now in the principal case it cannot be doubted, but that it was the plain and full intent of *Margaret Sisson* the testator's wife, that after her death, her husband's daughter *Hester*, by virtue of this deed of release, should be intitled to the premisses to her and the heirs of her body: this cannot be denied; and any writing, expressing such the party's intent, amounts in law to a good appointment, and to a good execution of the power.

'Tis true, where in an execution of a power the party is confined to observe any particular circumstances, as that of attesting a deed with such and such witnesses, &c. those circumstances (*a*) must be observed (*z*); but where the party is

(*a*) See the case of Bath v. Montagu, Chan. Reports in 8vo. 2 part, 417.

(*z*) See *Hawkins* v. *Kemp*, 3 East. 410. *Wright* v. *Wakeford*, 17 Ves. 454. 4 Taun. 213. *Doe* v. *Peach*, 2 M. & S. 576. *Doe* v. *Pearce*, 2 Marsh. 102. 6 Taun. 402. S. C. and st. 54 Geo. 3. c. 168.

left at liberty in that respect, and not confined to any particulars, but has (as in this case) a power in general to dispose of the premisses to any of her husband's children, any writing signed by the party, expressing the party's intent to dispose of the premisses to any of her husband's children, is a good appointment; and consequently, this deed of release plainly [159] expressing an intent, that after her decease, the daughter *Hester* shall have the premisses in tail, such writing is a good appointment.

Suppose the testator's wife had, by this deed of release, said no more than declared, that the premisses, after her decease, should be to the use of *Hester* her first husband's daughter and the heirs of her body, it could not have been doubted, but that this had been a good appointment, and a good execution of the power. And 'tis as plain, that by this deed of release, the testator's wife says *that*, though at the same time she says a great deal more. She does indeed, by many words, grant the premisses to trustees and their heirs; but this is declared to be to the use of herself for her life, and afterwards to the use of her husband's daughter and the heirs of her body.

Now this declaring of the use is alone sufficient, this use is limited to the party herself; and surplusage, even in special pleadings, nay even in indictments, will not hurt, much less in a conveyance.

So that rather than the deed shall be wholly void, *ut res magis valeat quam pereat*, the several clauses of the deed, except what declare the use to *Hester* after her mother's death, shall be rejected, and that part shall stand and be a good appointment, and the clause limiting the use to the testator's wife *sans* waste shall be void.

It has been objected, that by this lease and release, it seems intended to be a conveyance from the parties rather as owners than by virtue of a power, and the rather, for that in this case the parties have some ownership, I mean, an estate for life in *Margaret Sisson* the testator's wife, which her husband and she are capable of granting over, and that may be objected as sufficient to satisfy the grant.

Now 'tis true, that where a man is owner of an estate, and [160] is also enabled by virtue of a power to dispose of this estate, and this man does grant or devise such estate generally, this shall operate upon his right of ownership, and not by virtue of his power, as in 6 Co. 18. a. Sir *Edward Cleere*'s case. Where a man makes a feoffment of his land to such uses, and for such estates, as he shall by his will appoint, the feoffor

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still continues owner of this land, and if the feoffor makes his will, and, instead of limiting the uses of this feoffment, does devise the land generally, the land, in this case, passes from the testator as owner, and not by virtue of the power.

But 'tis as true, and proved by the same authority, that where one as owner of land is *not* able to grant the estate mentioned to be conveyed; but by virtue of the power he *is* able to grant it, the grant in this case shall take effect by virtue of the power, and shall not operate upon the ownership.

Therefore in our case, since the testator's wife *Margaret could not*, as owner, pass the estate-tail to *Hester* to commence from and after her own decease, nor indeed had any ownership for the supplying of that grant, it being to commence after her death, at which time her estate or interest (being for her life) determines; and since *Margaret* the testator's wife *could*, by virtue of her power, grant this estate to *Hester;* therefore the grant of this estate-tail shall take effect from her power, and not from any pretence of ownership. (1)

It is settled in this case of Sir *Edward Cleere*, and in *Scroope*'s case in 10 Co. 143. b. that though there be no recital
[161] of the power, yet if the grant cannot take its effect without the power, the grant shall operate upon the power.

Much rather shall it be so in this case, where the very power, and the will that gave it, are both recited in the deed of release, and where the recital of the power, is a plain demonstration, that this power was thought of, and in view, when the deed was prepared, and that the only design and end of this deed (though drawn by an unskilful hand) was to execute such power.

'Tis also objected, that in the lease and release in the principal case, made by the testator's wife *Margaret* and her second husband, to trustees and their heirs to the use of herself for life, with remainder to *Hester* the testator's daughter in tail, these uses are intended to arise out of the estate of the trustees, and if there be not a sufficient estate conveyed to the trustees for that purpose, no use can arise.

Now as to this objection, 'tis true, that if the conveyance operates by virtue of the lease and release, the uses in such case must arise out of the trustees' estate; but if the deed of release operates as an appointment (as I apprehend it does), then the appointee is in under the will, and does no way derive his interest from the estate of the trustees in the release.

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(1) Vide *Andrews* v. *Emmott*, 2 Bro. C. C. 297.

And 'tis no objection, that the grantor intended that this conveyance should operate by way of lease and release, and not by virtue of the power as an appointment.

For the chief, and primary intent of the grantor, was, that the estate should pass to *Hester* the *cestuy que use* of this deed of release, and the court shall have more regard to this, than [162] to the manner of passing, which is of less moment and left (it may be) to the contrivance of some ignorant scrivener.

It is plain the chief intent of the parties is to pass the estate. Consequently,

The method, by which 'tis intended to pass, ought to be only subservient to the chief intent.

And for this purpose in 3 Lev. 372. in the case of *Osman* v. *Sheafe*, Mr. Justice *Rookeby* cites the case of *Saunders* and *Savile*, cited also in 2 Lev. 213. and mentioned to be adjudged in *Com. Banc. Hil. anno* 1655. Rot. 1578. where a man seised in fee of a rent, does by deed grant it to one that was his kinsman, and there is an attornment to the grant, but the attornment was made by one that was not a real tenant of the land, and therefore void: here, though the intent appeared, that the deed should operate as a grant at common law with an attornment, yet since it could not pass that way, it was adjudged that the grant being made to a relation, should operate as a covenant to stand seised. And many other cases much of the same nature with this are there cited;

As where a man by deed does give and grant lands to another, and a letter of attorney to make livery is indorsed upon the deed, but no livery happens to be made; yet if this grant be made to a relation, it shall operate as a covenant to stand seised, though the letter of attorney indorsed on the deed for the making of livery, shews the plain intent of the deed, and of the parties thereto, to have been, that the land should pass in another manner, that is, by feoffment and livery.

So though a general warranty be contained in a deed [163] whereby lands are granted to a man and his heirs, with a general warranty against all persons whatsoever, and no livery, or a void livery is made; yet if this grant also be made to a relation, it shall operate as a covenant to stand seised, though the inserting the warranty shews the intent to have been, that the lands should pass by way of feoffment, in which case, the feoffee, if impleaded, might vouch upon the warranty; whereas it operating by way of use, and a covenant to stand seised, the grantee is in the *post*, and cannot vouch.

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Upon all which cases, Mr. Serjeant *Levinz* makes an observation very apposite to the present case: "That the judges, "of late times, have had a greater consideration for the *pass*- "*ing* of the estate which is the *substance* of the deed, than the "*manner how* which is the *shadow*."

All these cases are very pertinent to the matter now in question, and demonstrate, that though in the present case, it might be the intent of the conveyance, that the premisses should pass by way of lease and release, yet if they cannot pass that way (as they really cannot), but may pass by virtue of the power, and as an appointment (as they really may), they shall pass by virtue of the power, and as an appointment, rather than the deed shall be void.

If a deed, plainly intended to operate as a feoffment with livery, rather than be void, shall operate as a covenant to stand seised;

If a deed, plainly designed to operate as a grant with an attornment, rather than be void, shall operate as a covenant to stands eised; (1)

[164] Why shall not, in the principal case, an indenture of release, rather than be void, operate as an appointment?

In Mr. *J. Jones*'s Reports, 392. *Snape* v. *Turton*, the case was, *J. S.* was seised in fee of lands, and covenanted by indenture to levy a fine of the said lands to the use of himself for his life, with remainder to the use of his sons successively in tail male, remainder to the use of the then Lord *Leicester* in tail, remainder to the use of the Queen in fee; and in this indenture there was a proviso, that if *J. S.* who made this settlement, should grant or bargain and sell his lands to any other person or to any other uses, that then it should be to those uses.

J. S. who made this settlement, and reserved to himself an estate for his life, leased the premisses for a year to *A.* and afterwards by deed reciting the power, bargained and sold, and granted the reversion to another and his heirs, to which the lessee for years attorn'd.

Here, though there was an attornment to this grant, which shew'd plainly the intention of the party to pass this reversion as a common-law conveyance, by way of grant and at-

(1) This subject was much discussed in the court of K. B. and afterwards in the House of Lords, in *Tatlock* v. *Harris*, 3 T. R. 181. and *Gibson* v. *Minet*, 1 H. Bl. 569.

tornment; and though in this case the grantor had an estate for life, which might have passed by this grant, taking it as a grant with an attornment, and would have passed a descendible freehold, and so might in some measure have satisfied the grant (whereas in our case the grantors, *Margaret* the testator's wife, and her second husband *Sisson*, had no estate at all in them to satisfy the grant to *Hester* the testator's [165] daughter, that being of an use to commence after the mother's death, and she herself had but an estate for her life),

Yet in this case in *Jones* it is adjudged, that the grant, notwithstanding the attornment, which shews it was intended to be a common-law conveyance, should however operate upon the power, and be a good declaration of new uses pursuant to the power.

Now, this case comes fully up to our case, and differs only in being stronger; the power, in both cases, is accompanied with an estate for life; and the grant with an attornment, is as improper a way to execute the power, in the case cited, as the lease and release is, to execute the power, in the principal case; and that case seems stronger than the principal case in this, as well as in the other respects which I have mentioned, in regard, by this construction of the grant, (tho' with attornment, to operate as an execution of the power,) the remainder in fee limited to the crown, of whose revenues, the law in all cases, is particularly careful, is devested and barr'd.

There was the case of *Dyer* v. *Awister* in 1706, in this very point, which, tho' it was the opinion of one judge only, and at *Nisi Prius*, yet it being before that great man, your lordship's immediate predecessor, I take it to be a considerable authority.

In that case, a man had a power to appoint and settle a jointure on his wife; and he made a jointure on his wife by way of lease and release, to the use of his wife for her life, for her jointure; which is directly our case.

And C. J. *Holt* declared his opinion, that it was a good [166] jointure; and the rather, because the word [settle] was a general word, as to the manner of making the jointure. Now, in the principal case, we have as general a word; in our power it is, that the testator's wife might *dispose*. The word [dispose] is as general a word as the word [settle]; and if in that case, a lease and release was a good appointment of a jointure, then surely in the principal case, the lease and release must also be a good appointment, and a good execution of the power.

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It is true, in that case before C. J. *Holt* the counsel pressed for a special verdict, and had it; but were so far discouraged by his lordship's opinion, that (as I understand) it was never argued, but the jointure continues to be enjoyed to this day under that informal appointment that now occurs in the principal case.

There are many more cases which I could cite on this head.

But I shall trouble your Lordship with only two more; the first is that of *Stapleton*, cited by C. J. *Hale* in 1 Vent. 228. in the case of *King* and *Melling*, and cited again by C. J. *Hale* in Raym. Rep. 239. by the name of Lady *Hasting*'s case; which I take to be full in point.

The case was, *A.* tenant for life with a power to make a jointure, remainder to *B.* in fee, *A.* covenants with a third person to stand seised to the use of his wife for her life, for her jointure; and adjudged a good execution of the power. And the reason given in that case is extremely applicable to
[167] ours, *viz. Quando non valet quod ago, valeat quantum valere potest.*

Now the judgment in this last case is liable to all those objections, that can be made to me in the principal case. For instance, it is objected to me in the principal case, that the conveyance is intended to take effect by way of lease and release, and not by virtue of the power; why in that case cited by C. J. *Hale*, the intention appears as fully, that the jointure should take effect by way of covenant to stand seised, and not by way of a power.

Again it is objected, in the principal case that it is intended the use should arise out of the estate conveyed by the lease and release to the trustees, which is not sufficient for that purpose.

The same objection recurs in the case cited by C. J. *Hale*; for there the use is expressly declared to arise out of the estate of the tenant for life; he covenants to stand seised, and out of his seisin the use is to arise, and yet it is a good appointment of the jointure.

It is true, that case also differs in being stronger than the principal case; for in that case, there is no recital (1) of the power, as there is in this:

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(1) The recital of the power seems material only, as shewing a clear intention to execute it. *Molton* v. *Hutchinson*, 1 Atk. 558. *Probert* v. *Morgan*,

And as in that case it was adjudged a good execution of the power, so (I hope) it shall be in this.

Also in that case the court, in their resolution, rejected the greatest part of the deed, and regarded that part only that declared the use;

And so (I hope) the court will do here, rather than the deed [168] shall be taken to be wholly void.

As to the fine, levied by the testator's wife and her second husband, it being after the lease and release, the same cannot affect this case; in regard, before the levying the fine, the power is well executed by the deed of release, that amounting to a good appointment, and the estate is vested in *Hester*, and so the fine comes too late to do any hurt.

Tho' I take it very plainly, that supposing there had been nothing in the indenture of release, but a covenant to levy a fine to the use of the wife for life, with remainder to the use of *Hester* the first husband's daughter in tail, (as there is this covenant in the deed) I say, if there had been nothing else in the deed, and a fine had been levied accordingly (as there has been in the principal case,) this had been a good execution of the power, according to the case of *Herring* and *Brown* in 1 Vent. 368, 371. (*y*) Where the case was, one makes a settlement to the use of himself for life, with divers remainders over to several persons *in esse*, with power to revoke under his hand and seal attested by two or more credible witnesses; the tenant for life levies a fine of the premisses, and by deed subsequent declares the use of this fine.

And in this case, it was all along admitted, that if the deed declaring the use of the fine had been precedent to the fine, (as it is in the principal case,) it had been a good execution of the power, and a good revocation.

I admit, in the case of *Herring* and *Brown*, the deed be- [169] ing subsequent to the fine, it was adjudged in this court, that

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1 Atk. 440. *Ex parte Caswell*, 1 Atk. 559. *Countess of Roscommon* v. *Fowke*, 4 Bro. P. C. 523. *Andrews v. Emmott*, 2 Bro. C. C. 297. (*z*)

(*z*) See Sugd. Pow. 274. *Roe* v. *York*, 6 East 86. *Jackson* v. *Jackson*, 4 Bro. C. C. 461. *Blake* v. *Marnell*, 2 Ba. & Be. 44. *Wilson* v. *Piggot*, 2 Ves. jun. 355. *Standen* v. *Standen*, ib. 589. *Hales* v. *Margerum*, 3 Ves. 301. *Jones* v. *Curry*, 1 Swan. 66. *Doe* v. *Roake*, 2 Bing. 497. But a mere *general* bequest of *personalty* will not operate as an appointment of a fund over which the testator has only a power, although there be no other fund to satisfy the bequest, *Nannock* v. *Horton*, 7 Ves. 391. *Jones* v. *Tucker*, 2 Mer. 533. *Webb.* v. *Honnor*, 1 J. & W. 352.

(*y*) Skin. 187. S. C.

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the fine was an extinguishment of the power; but in error brought of this judgment in the exchequer chamber, the same was reversed (z); and resolved, that the fine and deed (though subsequent) were but as one conveyance, and therefore were a good execution of the power, a good revocation of the former uses, and a good declaration of new ones.

The other case is that of *Wigson* and *Garrit*, 2 Lev. 149. where *J. S.* makes a settlement with a power to revoke the uses therein, and limit new uses, by indenture sealed in the presence of three witnesses. *J. S.* covenants by indenture sealed in the presence of three witnesses to levy a fine to other uses, and levies a fine accordingly: whereupon it was adjudged by C. J. *Hale & Cur'*, that this was a good execution of the power, and a good revocation; for tho' the deed of covenant to levy the fine, would not, alone, make any revocation, for that it was not itself any conveyance, nor passed any use; and tho' the fine alone would make no revocation, that not being an indenture sealed in the presence of three witnesses, yet both jointly made one conveyance, and amounted to a good revocation.

So here the testator's wife being tenant for life, with a power to dispose of the premisses to any of her husband's children, if she had done no more than covenanted to levy a fine to the use of herself for life, remainder to the use of *Hester* (one of the husband's children) in tail, and had levied a fine accordingly (all which she has done), such covenant and fine would be as one conveyance, and this alone had been a good appointment, and a good execution of the power.

Obj. The appointment ought to be of a fee-simple, whereas she has appointed an estate-tail.

Resp. The power to dispose of a fee-simple includes in it a power to dispose of any lesser estates. (y)

[170] *Obj.* This disposition by *Margaret* should be by will, and not by deed, the devise being to her for life, and *then* to be at her disposal.

Resp. The word [then] signifies only when this appointment was to take effect in possession, (*viz.*) after the wife's death. In the case in 3 Leo. 71. where the devise was to the wife for her life, and *after her death* she to dispose as she pleased, &c. the words might well be intended of a will, and therefore that case was more liable to this

(z) Carth. 22. (y) *Isherwood* v. *Oldknow*, 3 M. & S. 382.

objection; yet it was adjudged she might grant away the reversion in her life-time. And in 3 Co. 19. *Boraston's* case, 'tis adjudged, that the adverbs [when] and [then] in case of limitation of estates, do not make any thing necessary to precede the settling of them, any more, than where one lets lands for life, and after lessee's decease, then the remainder to J. S. this remainder will vest presently.

Obj. the lease for a year, made by *Margaret* and her second husband, is a suspension of the power.

Resp. 'Tis not; the lease and release being but as one conveyance, and so in pleading (which is much more strict) a lease and release will amount to a feoffment, and is taken notice of by the court as a common assurance: besides, the power seems collateral, and not appendant to the estate, and so not extinguishable, tho' by a feoffment. Thus in case of a power to executors to sell, a feoffment made by them of the premisses, will not extinguish their power, but they may afterwards sell notwithstanding. 1 Co. 111.

Or if it be a power appendant to the freehold, as long as *that* remains, the power remains also; and therefore, the leasing for a year will no more suspend the power, than a lease for a year made by one jointenant will sever the jointenancy: And in the case of *Snape* and *Turton*, in Mr. J. Jones's Reports, 392. 'tis expressly adjudged, that leasing for a year did not suspend the power of revocation, as to the reversion and inheritance.

Upon the whole: if it appears to be the plain intent of the parties, that the estate should pass to *Hester* in tail, expectant [171] on her mother's death (as most evidently it does): if any words in writing expressing the intent, will amount to a good execution of the power (as surely they will): if these words in this release be allowed sufficiently to express that intent (as plainly they do); then, upon the authorities I have mentioned, which (as I take it) come fully up to the point, this declaring of the use to *Hester* by this release in the principal case, is a good appointment to *Hester*, and a good execution of the power; and had there been only a covenant in the deed of release for the levying of a fine to these uses (tho' I have no manner of occasion for this point), yet such covenant, and the fine afterwards levied would have been a good appointment to *Hester*.

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And therefore I pray, that the judgment given by my Lords the judges in the Common Pleas may be affirmed.

Parker C. J. With respect to the first question, *viz.* what estate passes by the will to *Margaret* the testator's wife; we are all of opinion, she has but an estate for life, with a power of disposing of the inheritance. And as to this, the difference is, where a power is given with a particular description and limitation of the estate (as here), and where generally, as to executors to give or sell; for in the former case, the estate limited being express and certain, the power is a distinct gift, and comes in by way of addition; but in the latter, the whole is general and indefinite; and as the persons intrusted are to convey a fee, they must, consequently, and by a necessary construction, be supposed to have a fee themselves. (1)

With regard to the other question (*viz.*) the execution of the power, it is clearly our opinion, that this conveyance by way of lease and release is an effectual, tho' improper, execution of the power. (2)

Wherefore the judgment in *C. B.* must be affirmed.

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(1) So *Maskelyne* v. *Maskelyne*, Amb. 750. (*z*)

(2) Vide *Dormer* v. *Thurland*, post. Vol. II. 506. *Ross* v. *Ewer*, 3 Atk. 156. *Bramhall* v. *Hall*, Amb. 467. (*y*) *Wright* v. *Englefield*, Amb. 468. and S. C. by the name of *Wright* v. *Lord Cadogan*, 6 Bro. P. C. 156. (*x*) *Rippon* v. *Dawding*, Amb. 565. *Earl of Darlington* v. *Pulteney*, Cowp. 260. *Sprange* v. *Barnard*, 2 Bro. C. C. 585. (*w*)—For the cases, in which the courts of equity will supply a *defective* execution of a power, if supported by a *valuable*, or *meritorious* consideration, vide *Tollett* v. *Tollett*, post. Vol. II. 489.

(*z*) And see *Holmes* v. *Coghill*, 7 Ves. 499. and 12 Ves. 206. *Reid* v. *Shergold*, 10 Ves. 370. *Hixon* v. *Oliver*, 13 Ves. 108. *Bradley* v. *Westcott*, ib. 445. *Harrington* v. *Harte*, 1 Cox, 131.

(*y*) 2 Eden, 220. S. C.

(*x*) 2 Eden, 239. S. C.

(*w*) *Roach* v. *Wadham*, 6 East, 289. *Doe* v. *Thorley*, 10 East, 438. *Ex parte Williams*, 1 J. & W. 93.

1906. 2. Ch. 208.

DE TERM. S. MICHAELIS, 1711.

1892. 2 Ch. 95

LINGEN *versus* SOWRAY. (1)

CASE 42.

LORD KEEPER HARCOURT.

Pre. Cha. 400. Gilb. Chanc. 325, 326. Gilb. Eq. Rep. 91. 1 Eq. Ca. Ab. 175. pl. 5. 10 Mod. 39. 528. Money articled to be laid out in land is to be taken as land, even as to collateral heirs. (*z*)

BY articles before marriage, the husband agreed to add 700*l.* to the wife's portion of 700*l.* and the securities for these monies were assigned to trustees, and agreed to be invested in land, to be settled on the husband for life, remainder to the wife for life, remainder to the first, &c. son in tail male, remainder to the daughters in tail, remainder to the right heirs of the husband.

The marriage afterwards takes effect, and there being no issue thereby,

The husband by will devises some lands to the wife; *the rest of his real estate in the county and city of* York, *and elsewhere in* Great Britain, he devises to *J. S.*; also he gives his personal estate, *and all his securities for monies, to his wife,* whom he makes executrix, and dies, leaving many of the securities *remaining unaltered*; but some of the money had been put out upon *other securities,* and was mentioned to be in trust for the *husband, his executors and administrators.*

And the question was, whether these securities, or any of them, passed as personal estate to the wife? [173]

It was objected, that tho' equity would inforce an execution of agreements, yet the end and scope of these articles were determined, save only as to the wife's life,

(1) This state of the case agrees with the Register's Book, vide post. Vol. III. 221, note (*a*).

(*z*) *Walker v. Denne*, 2 Ves. jun. 170. *Chitty* v. *Parker*, *Collins* v. *Wakeman*, ib. 271, 683. *Kennel* v. *Abbott*, 4 Ves. 802. *Wheldale* v. *Partridge*, 5 Ves. 388. 8 Ves. 227. *Thornton* v. *Hawley*, 10 Ves. 129. *Biddulph* v. *Biddulph*, 12 Ves. 161. *Kirkman* v. *Milles*, 13 Ves. 338. *Ashby* v. *Palmer*, 1 Mer. 206. And see *Cruse* v. *Barley*, post. Vol. III. 20. *Halliday* v. *Hudson*, 3 Ves. 210. *Ripley* v. *Waterworth*, 7 Ves. 425. *Brown* v. *Higg*, *Bell* v. *Phyn*, ib. 279. 453. *Williams* v. *Coade*, 10 Ves. 500. *Berry* v. *Usher*, 11 Ves. 87. *Hooper* v. *Goodwin*, 18 Ves. 156. *Hill* v. *Cock*, 1 V. & B. 173.

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(*viz.*) the husband was dead, and there was no issue of the marriage, and the consideration, or inducement to this settlement looked no further, nor had any more extensive views; that it could not be the design of the settlement to take care of, or provide for, distant or remote heirs.

And that if this money had been laid out in a settlement, yet still it had been in the power of the husband to devise the land purchased therewith; for it would have been a vested remainder in fee in himself, and consequently absolutely at his disposal.

The only question then was, whether he intended to devise it?

Now it was more probable that he intended to pass it under the denomination of *personal* than *real* estate; for that, in fact, those securities were personal estate, and must continue so, till actually invested in land; and by the devise of all his real estate in the city or county of *York*, or elsewhere in this kingdom, he must have alluded to *land*, and something *local*.

That it was not to be presumed the testator, who was a layman, took it, that the covenant altered the nature of the estate, and made that real, which before was, and in fact afterwards continued to be, personal estate; and in case of wills, the intent of the testator was the chief thing
[174] to be regarded and inquired after, and surely, when the testator bequeathed all his personal estate, nay when he expressly devised all his *securities*, these securities in question must be intended to pass; or if this should not be admitted in the latitude that was contended for, at least it would hold as to such of the securities, as had been altered, and taken, though in the names of the same trustees, yet upon *different trusts*.

Mr. *Vernon contra*, insisted that equity, which inforced the execution of agreements, looked upon money agreed to be invested in land, as land; and on the other hand, considered land agreed to be sold, as money; and therefore if a man should article for the purchase of the manor of *D.* which was an estate in fee, for 5000*l.* and die, though the 5000*l.* till invested, would go to the executors, yet equity would inforce an execution of the articles, and then it should go to the heir; so if one seised of land in fee should agree to sell it, and should die before sale, till sold it would be in fact a real estate, and as such, descend to the

heir, but equity would inforce a sale according to the agreement, by which it would become money, and go to the executor.

But there was still more reason why money agreed to be invested in land should be taken as a real estate, in regard this was for the benefit of the heir, who was (*a*) favoured in equity, beyond an executor or administrator.

(*a*) Vide post. Hayter *v.* Rod, 364.

To which purpose he cited the case of (*b*) *Whitwick* v. *Jermyn*, at which Lord C. J. *Hale* assisted, and the case of (*c*) *Kettleby* v. *Atwood*, where upon articles to lay out money in a purchase, and the party dying before the execution of such articles, the dispute was betwixt the heir and executor, and decreed for the heir; he also cited Sir *Jonathan Atkyns*'s case (*d*), as a strong case in equity, in Lord Chancellor *Jeffreys*'s time, where upon marriage-articles it was agreed, that 1500*l.* of the husband's money, and 1500*l.* of the wife's money, should be laid out in a purchase of land, and settled upon the husband for life, remainder to the wife for life, remainder to the issue of the marriage, but was silent where it should go *afterwards, in default of issue*, and the husband and wife dying without issue, the question was, whether the executor of the husband or the executor of the wife, or the heir of the husband or the heir of the wife, should have the benefit of these articles?

(*b*) 1 Vern. 471.

(*c*) 1 Vern. 298. 471.

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(*d*) 2 Vern. 20.

And decreed, that the articles making this money as land, it should be taken to be real estate, and should go to the heirs of the husband, and not to the heirs of the wife; in regard that in the common way and usage of conveyances and settlements, the remainder in fee was, in such case, limited to the heirs of the husband.

[*Sed quære*, If the money was to be taken as land, it had not been reasonable in this last case to let one half, (*viz.*) the wife's 1500*l.* or the land therewith to be purchased, go to the heir of the wife, and the other 1500*l.* or the land therewith to be purchased, go to the heir of the husband?]

That this case of *Atkins*'s was much stronger than the principal case: for in that, the uses in the articles were all determined by the death of the husband and wife without issue; and yet, when all the ends of the marriage articles were answered, and at an end, it was decreed to be as land, and as real estate; whereas in the principal case, the wife being living, all the uses in the marriage articles were not determined; for the wife by the articles was to have the benefit of them

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for her life, *viz.* to have the profits of the lands to be purchased for her life; and it was said, equity had gone further, by directing, where money had been decreed to be laid out in the purchase of lands in fee, that (*a*) the wife should have dower.

(*a*) See 2 Vern. 536. Sweetapple v. Bindon, where the husband, under such circumstances, was allowed to be tenant by the curtesy; and ante 110. (1)

Lord Keeper: The articles have, in equity, changed the nature of this money, and turned it, as it were, into land; and therefore, as to so much of the 1400*l.* as is subsisting upon the securities on which it was originally placed, or on any other securities, where no new trusts have been declared, it ought to be considered as real estate; but as to the 250*l.* of it which was called in by the testator, and afterwards placed out on securities on a different trust, that shall be taken to be personal estate; forasmuch as there being no issue of the marriage, it was in the power of the husband to alter, and dispose of it, as against the heir at law, though not against his wife; and this placing it out upon different trusts I take to be an alteration of the nature of it, since the testator's declaring the trust to his *executors*, seems *tantamount* with his having declared that it should not go to his *heir*. (2)

On an appeal before Lord *Cowper* (*Term' Paschæ* 1715), this decree was affirmed.

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(1) So *Cunningham* v. *Moody*, 1 Ves. 176.

(2) Vide *Edwards* v. Countess of *Warwick*, post. Vol. II. 171. *Guidot* v. *Guidot*, 3 Atk. 254. *Pulteney* v. Earl of *Darlington*, 1 Bro. C. C. 223, *Rashleigh* v. *Master*, 3 Bro. C. C. 99.

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CASE 43.

Sir JOHN TREVOR, Master of the Rolls.

Salk. 578.

LORD ROCKINGHAM *et al' versus* DR. PENRICE *et al'*.

SIR *James Oxenden*, before marriage, and in consideration of 10,000*l.* portion, settled an estate upon his lady (the plaintiff

Lessor dies on Michaelmas day, and before sun-set. The heir or jointress, and not the executor, shall have the rent. (*z*) Q. If the lessor had died after sun-set, though before midnight? If the tenant had paid the rent on the day, the payment had been good, though the lessor had died before sun-set; but his executors to account for this to the jointress, &c. Q.

(*z*) See *Ex parte Smyth*, 1 Swan. 337, and the note (*a*). *Jenner* v. *Morgan*, post. 392. *Hay* v. *Palmer*, post. Vol. II. 501.

the Lord *Rockingham's* sister) for her life for her jointure, with a power for himself to make leases at the usual rent.

Accordingly Sir *James* made leases pursuant to the power, of several parts of the land comprised in this settlement, reserving the rent at *Lady-day* and *Michaelmas*, and died upon *Michaelmas-day* between three and four in the afternoon and before sun-set. And one of these several lessees, to whom the leases were made, paid his rent (being 18*l.*) unto Sir *James Oxenden* in the morning of the said *Michaelmas-day;* but the other tenants had not paid their rent, the arrears whereof came to about 500*l.*

Hereupon the sole question was, whether these arrears did belong to the defendants, the executors of Sir *James Oxenden* the lessor, or to the jointress?

For the former it was insisted, that when *Michaelmas-day* came, the rent was due on that day, and therefore, according to *Clun's* case, 10 Co. 127. b. if on *Michaelmas-day*, being the rent day, the tenant pays the rent in the morning to the lessor, who dies before noon, this payment, though voluntary, is a good payment against all but the King; so that it is not material that the payment was not compulsive, or that there was no remedy for it by debt or distress: in regard it [178] appears by that book, that the payment, though voluntary, is notwithstanding good against the heir. And the case in 1 Saunders 287. of *Duppa* v. *Mayo*, was, by the counsel denied to be law, where it is said to be the opinion of *Hale* C. J. that if one leases for years, rendering rent, and dies on the rent-day after sun-set and before midnight, this rent shall go to the heir, and not to the executor, for that (as it is there said), though a convenient time before sun-set is the proper time to demand the rent, yet it is not due until "the "end of the day, *videlicet*, twelve of the clock at night," which they objected was not law; since at furthest, the rent was due from the tenant to the lessor at sun-set; for a convenient time before sun-set, for the telling the money, was the time for the landlord to demand his rent; upon non-payment of which, the lease might be avoided.

But it would be absurd to say, the lessee should forfeit the lease for non-payment of the rent, before it was due; and a case was cited betwixt † *Bellasis* and *Cole*, at the assizes at [179]

† The following note was communicated to me by Mr. Justice *Tracy*. *Southern* v. *Bellasis*. In ejectment. This was made a case upon a trial before Judge *Tracy*, 19 *Apr.* 13 *W.* 3. By deed and fine a term of 500 years of the

LORD ROCKINGHAM v. PENRICE.

One grants a rent charge for life, payable every Lady-day and Michaelmas; grantee dies on Michaelmas-day after sun-set, and before twelve at night, yet adjudged he should pay the arrears to the executor of the grantee, in regard the grantee lived till sun-set, which was the legal time to demand it, and it cannot be demanded till due, especially to make a forfeiture of the lease, &c. Secus, if the grantee had died on Michaelmas-day and before sun-set.

Durham before Mr. Justice *Tracy*, where one granted a rent-charge for life, payable at *Lady-day* and *Michaelmas*; the grantee died on *Michaelmas-day* after sun-set; and the question was, whether the executor of the grantee should have the rent? And for that the grantee lived until after sun-set, which was the legal time for demanding the rent, though he died before twelve of the clock at night, yet it was held by that judge, that this rent should go to the executor. Besides, it was observed, that according to the other construction, if the jointress, in the present case, should live but one *half-year* after the death of the husband, she might have a *whole* year's rent, which would be unreasonable.

But on the other side it was argued, and solemnly decreed by the Master of the Rolls, that the lessor, in the principal case, dying before sun-set, and there being no remedy for the lessor against the lessee, before his [the lessor's] death, to compel the payment of this half-year's rent; and upon the authority of *Clun*'s case, the half-year's rent reserved payable at *Michaelmas*, should, upon the death of the lessor before sun-set, go the jointress, who then had the reversion;

[180] But that as to the 18*l.* rent paid by one of the tenants to the lessor upon *Michaelmas-day* in the morning, this was a

tenements in question is created to the lessors of the plaintiff, for securing an annuity of 500*l. per ann.* and all arrears thereof, payable to Sir *Ralph Cole* during his life, and after his decease for securing an annuity of 200*l. per annum*, and all arrears thereof, payable to the Lady *Cole* for her life, granted *prout* the deed, in such manner and with such remedies *prout* the deed. Sir *Ralph Cole* died, and all the arrears of rent due in his life-time were paid, and the Lady *Cole* survived him. Afterwards the Lady *Cole* died, *viz.* on *Michaelmas-day* 1704, at nine of the clock at night, being the first day of payment after Sir *Ralph Cole*'s death, and the plaintiff is her administrator. The sole question is, whether the term be void without payment of this quarter's rent, or whether this quarter's rent remains due to Lady *Cole*, so as to intitle her administrator thereto within the construction of this deed?

Rich. Wyn. pro Quer.
Tho. Parker pro Deft.'

I am of opinion that this money was due when by law it ought to be paid; therefore, since the Lady *Cole* lived beyond sun-set, which was the time when the money was demandable, and to be paid by the tenant upon pain of forfeiting his lease, I think the money was due to her, and ought to be paid to her, and that her administrator is intitled to the same.

Jan. 18. 1706. *Robt. Tracy.*

Note, *J. Tracy* told me that he advised with Lord C. J. *Holt* at his chambers, and that, upon view of the several authorities relating to this point, his Lordship was of the same opinion.

good payment as to the lessee the tenant, and he should not be compelled to pay the same over again; but that the executors of Sir *James*, that received this half-year's rent, should pay and account for the same unto Lady *Oxenden* the jointress.

Q. As to the last point; for if the 18*l.* rent was a good payment at law, (as certainly it was, according to *Clun*'s case) why must it not be so in equity?

See the case of Lord *Strafford* v. Lady (*a*) *Wentworth*, where Sir *Henry Johnson* tenant for life, remainder to his wife Lady *Wentworth* for life, made a lease at will rendering rent; and died on *Michaelmas-day* betwixt three and four in the afternoon, and before sun-set; and Lord *Strafford*, as administrator to Sir *Henry Johnson* claiming the rent,

Lord Chancellor Macclesfield held Lord *Strafford* well intitled thereto; and cited the above mentioned case of *Cole* v. *Bellasis*, and said, there was a diversity betwixt a rent incident to a reversion that must go somewhere, (*b*) (if not to the executor, then to the heir) and where the rent was to go no where, unless to the executor; in the latter case, if the lessor lived to the beginning of that day, at which time, a voluntary payment of the rent might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than that it should be lost; for it would be strange, if the tenant should pay the rent to none; and as that case was, the person in remainder (*viz.* the jointress) could have no pretence to the rent, it being a lease at will, and consequently such as could have no continuance with respect to her. †

(*a*) Pre. Cha. 555. Where lessor reserves a rent, and dies on the rent day about twelve at noon, if the lease must determine by his death, the rent, rather than be lost, shall go to his executors. Cont' if the lease is to have a continuance.

(*b*) Vide post. 392. Jenner *v.* Morgan.

† *Vide* the act of the 11th G. 2. for the more effectual securing the payment of rents, and preventing frauds by tenants.

DE TERM. S. HILLARII, 1711. B. R.

CASE 44.

MITCHEL *versus* REYNOLDS.

10 Mod. 27. 85. 130. Fort. 296. Resolution of the court of B. R. A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. (*z*) Secus if it be on no reasonable consideration, or to restrain a man from trading at all.

DEBT upon a bond. The defendant prayed *Oyer* of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in *Liquorpond Street*, in the parish of *St. Andrew's Holborn*, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis et auditis*, he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade, *prout ei bene licuit*. Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, *Parker*, C. J. delivered the resolution of the court.

[182]

The general question upon this record is, whether this bond, being made in restraint of trade, be good?

And we are all of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts *with* and *without* consideration; and that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, *viz.* where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head, and to reconcile the jarring opinions; in order whereunto, I shall proceed in the following method.

(*z*) So, *Davis* v. *Mason*, 5 T. R. 118.

1*st*, Give a general view of the cases relating to the restraint of trade.

2*dly*, Make some observations from them.

3*dly*, Shew the reasons of the differences which are to be found in these cases; and

4*thly*, Apply the whole to the case at bar.

As to the cases, they are either, first, of involuntary contracts, against, or without, a man's own consent; or secondly, of voluntary restraints by agreement of the parties. [183]

Involuntary restraints may be reduced under these heads:

1*st*, Grants or charters from the crown.

2*dly*, Customs. (*z*)

3*dly*, By-laws.

Grants or charters from the crown may be,

1*st*, A new charter of incorporation to trade generally, exclusive of all others, and this is void. 8 Co. 121.

2*dly*, A grant to particular persons for the sole exercise of any known trade; and this is void, because it is a monopoly, and against the policy of the common law, and contrary to *Magna Charta*. 11 Co. 84.

3*dly*, A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1. cap. 3. sect. 6. (*y*) to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

Restraints by custom are of three sorts.

1*st*, Such as are for the benefit of some particular persons, who are aledged to use a trade for the advantage of a community, which are good. 8 Co. 125. Cro. Eliz. 803. 1 Leon. 142. Mich. 22 H. 6. 14. 2 Bulst. 195. 1 Roll. Abr. 561. [184]

2*dly*, For the benefit of a community of persons who are not alledged, but supposed to use the trade, in order to exclude foreigners. Dyer, 279. b. W. Jones, 162. 8 Co. 121. 11 Co. 52. Carter 68. 114. held good.

3*dly*, A custom may be good to restrain a trade in a particular place, though none are either supposed or alledged to use it; as in the case of *Rippon*, Register 105, 106.

(*z*) See *Mayor of Winton* v. *Wilks*, 1 Salk. 203. 3 Salk. 349. and 2 Ld. Ray. 1129. S. C.

(*y*) As to copyright, see, St. 8 Anne, c. 19. 12 G. 3. c. 36. 15 G. 3. c. 43. 41 G. 3. c. 107. 54 G. 3. c. 156. and see 2 Evans's St. 616. As to property in prints, see 8 G. 2. c. 13. 7 G. 3. c. 38. 17 G. 3. c. 57. in models, 38 G. 3. c. 71. 54 G. 3. c. 56. and in patterns, 27 G. 3. c. 38. and 34 G. 3. c. 23.

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Restraints of trade by by-laws are these several ways.

1*st*, To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter 68. 114. 8 Co. 125. (1) But where there is no precedent custom, such by-law is void. 1 Roll. Abr. 364. Hob. 210. 1 Bulst. 11. 3 Keb. 808. (2) But the case in *Keble* is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2*dly*, All by-laws made to cramp trade in general, are void. Moor, 576. 2 Inst. 47. 1 Bulst. 11. (*x*)

3*dly*, By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases, (3) (*viz.*) if they are for the benefit of the place, and to avoid public inconveniences, nusances, &c. Or for the advantage of the trade, and improvement of the commodity. Sid. 284. Raym.
[185] 288. 2 Keb. 27. 873. and 5 Co. 62. b. which last is upon the by-law for bringing all broad-cloth to *Blackwell-Hall*, there to be viewed and marked, and to pay a penny *per* piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 309. the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties, are either,

1*st*, General, or

2*dly*, Particular, as to places or persons.

General restraints are all void, whether by bond, covenant, or promise, &c. with or without consideration, and whether

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(1) *Wolley* v. *Idle*, 4 Burr. 1951. (*z*)
(2) Vide *Harrison* v. *Godman*, 1 Burr. 12. *Hesketh* v. *Braddock*, 3 Burr. 1856. (*y*)
(3) *Wannell* v. *Chamber of the City of London*. 1 Stra. 675. The *King* v. *Harrison*, 3 Burr. 1322. *Pierce* v. *Bartrum*, Cowp. 269. (*w*)

(*z*) *Bodwic* v. *Fennell*, 1 Wils. 233.
(*y*) *Adley* v. *Reeves*, 2 M. & S. 53.
(*x*) *Rex* v. *Cooper's Company*, 7 T. R. 543. *Rex* v. *Tappenden*, 3 East 186.
(*w*) *Eagleton* v. *E. I. Company*, 3 Bos. & Pul. 63. *Rex* v. *Faversham*, 8 T. R. 352. And see *Adley* v. *Whitstable Company*, 17 Ves. 315.

it be of the party's own trade, or not. Cro. Jac. 596. 2 Bulst. 136. Allen, 67.

Particular restraints are either, 1*st*, without consideration, all which are void by what sort of contract soever created. 2 H. 5. 5. Moor, 115. 242. 2 Leon. 210. Cro. Eliz. 872. Noy, 98. Owen, 143. 2 Keb. 377. March, 191. Show. 2. (not well reported), 2 Saund. 156.

Or 2*dly*, Particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136. *Rogers* v. *Parry*. Though that case is wrong reported, as appears by the roll which I have caused to be searched, it is B. R. Trin. 11 Jac. 1. Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98. W. Jones, 13. Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general, and restraints particular, and with or without consideration, which stands upon very good foundation: *Volenti non fit injuria;* a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place. [186]

Palm. 172. *Bragg* v. *Stanner*. The entering upon the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration in that case.

Vide March's Rep. 77. but more particularly *Allen*'s 67. where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1*st*, That to obtain the sole exercise of any known trade throughout *England*, is a complete monopoly, and against the policy of the law. [187]

2*dly*, That when restrained to particular places or persons, (if lawfully and fairly obtained) the same is not a monopoly.

3*dly*, That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

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4*thly*, That it is lawful upon good consideration, for a man to part with his trade.

5*thly*, That since actions upon the case are actions *injuriarum*, it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it *injuriously*.

6*thly*, That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7*thly*, That no man can contract not to use his trade at all.

8*thly*, That a particular restraint is not good without just reason and consideration.

Thirdly, I proposed to give the reasons of the differences which we find in the cases; and this I will do,

1*st*, With respect to involuntary restraints, and

[188] 2*dly*, With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these, as are created by grants and charters from the Crown and by-laws, generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject.

2*dly*, Another reason is drawn from *Magna Charta*, which is infringed by these acts of power; that statute says, *nullus liber homo, &c. disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, &c.* and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, no body can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall shew the reason of the differences in the case of voluntary restraint,

1*st*, Negatively.

2*dly*, Affirmatively.

1*st*, Negatively; the true reason of the disallowance of

[189] these in any case, is never drawn from *Magna Charta;* for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

2*dly*, Neither is it a reason against them, that they are con-

trary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty; as in the case of a covenant not to erect a mill upon his own lands. J. Jones, 13. Mich. 4 Ed. 3. 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favour and indulgence of the law to trade and industry.

3*dly*, It is not a reason against them, that they are against law, I mean, in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense, are reducible under one of these heads.

1*st*, Either to do something that is *malum in se*, or *malum prohibitum*. 1 Inst. 206.

2*dly*, To omit the doing of something that is a duty. Palm. 172. Hob. 12. *Norton* v. *Sims*.

3*dly*, To encourage such crimes and omissions. Fitzherb. tit. Obligation, 13. Bro. tit. Obligation, 34. Dyer 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and [190] therefore, as in 1 Inst. 206. a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1*st*, That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12. Cro. Car. 22. Perk. 228.

2*dly*, That all things prohibited by law, may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither *mala in se*, nor *mala prohibita*, and the law allowing them in some instances, as in those of customs and *assumpsits*, they may be restrained by condition.

2*dly*, Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1*st*, the mischief which may arise from them, 1*st*, to the party, by the loss of his livelihood, and the subsistence of his family; 2*dly*, to the publick, by depriving it of an useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from

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masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

3*dly*, Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general
[191] restraint throughout *England;* for what does it signify to a tradesman in *London*, what another does at *Newcastle?* and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The *Roman* law would not inforce such contracts by an action. See † Puff. lib. 5. c. 2. sect. 3. 21 H. 7. 20.

4*thly*, The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

5*thly*, The law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void. *Barrow* v. *Wood*, March, Rep. 77. Mich. 7 Ed. 3. 65. Allen, 67. 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Resp. I do not see why that should not be shewn by pleading; though certainly the law might be settled either way without prejudice; but as it now stands the rule is, that
[192] wherever such contract *stat indifferenter*, and for ought appears, may be either good or bad, the law presumes it *primâ facie* to be bad, and that for these reasons:

1st, In favour of trade and honest industry.

2*dly*, For that there plainly appears a mischief, but the

† The instances there mentioned are, that if any should agree not to wash their hands, or change their linen, for such a time, there could be no need to trouble a magistrate on the breach of such agreements, which would tend to no consequence when put in execution.

benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be over-borne by the apparent mischief.

3*dly*, For that the mischief (as I have shewn before) is not only private, but public.

4*thly*, There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the publick, every body is affected thereby; for it is to be observed, that tho' it be not shewn to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason, (*viz.*) as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As 1*st*, That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place only where the consideration is not shewn can be no reason why, in cases where the special matter appears so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will inforce these latter contracts, but not the former.

6. Sim. 348.

2*dly*, It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in *assumpsits*, or implied, as in *bonds* and *covenants*, but these latter, tho' they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seised, which is void without a consideration, tho' it be a compleat and perfect deed.

[193]

3*dly*, It shews why a contract not to trade in any part of *England*, tho' with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, tho' it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4*thly*, This shews why promises in restraint of trade have been held good; for in those contracts, it is always necessary to shew the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shewn. And it also accounts not only for all the reso-

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lutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of judge *Hall* in 2 H. 5. *fol. quinto*; for suppose, (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, &c. at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think
[194] this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, tho' not his manner † of expressing it. Surely it is not fit that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason, see 3 Lev. 241. Now a bond may be considered two ways, either as a security, or as a compensation; and

1*st*, Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

2*dly*, Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the *quantum* of damages for such an injury? Bract. lib. 3. c. 2. §. 4.

(*a*) Post. Grantham v. Gordon, 614.

It would be very strange, that the law of *England*, that (*a*) delights so much in certainty, should make a contract void, when reduced to certainty, which was good when loose and uncertain; the cases in March's Rep. 77. 191. and also Show. 2. are but indifferently reported, and not warranted by the authorities they build upon.

1*st Object.* In a bond the whole penalty is to be recovered, but in *assumpsit* only the damages.

† *Hall* expressed himself thus: *A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, et* per Dieu *si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy.*

Resp. This objection holds equally against all bonds whatsoever.

2*d Objection.* Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Resp. The case of an infant stands on another reason, (*viz.*) a general disability to make a deed; but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common law he could take nothing for doing his duty, but the statute has given him certain fees; but he can neither take more, nor a chance for more, than that allows him.

3*d Object.* It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

Resp. 1*st*, It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

2*dly*, It is to ascertain the damages; but *cui bono* (say they) should that be done? is it for the benefit of the obligor?

Resp. Certainly it may be necessary on that account for these reasons:

1*st*, A bond is a more favourable contract for him than a promise; for the penalty is a re-purchase of his trade ascertained before hand (1), and on payment thereof he shall have it again; he may rather chuse to be bound not to do it under a penalty, than not to do it at all. [196]

2*dly*, However it be, it is his own act.

3*dly*, He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

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(1) Sed vide *Hardy* v. *Martin*, 1 Bro. C. C. 419, note. (*z*)

(*z*) S. C. 1 Cox, 26.

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4*thly*, Restraints by custom may (as I have proved) be inforced with penalties which are imposed without the party's consent, nay by the injured party without the concurrence of the other; and if so, then *à fortiori* he may bind himself by a penalty.

Object. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labours to prevent.

Resp. But this is no more to be presumed than false testimony, and in such a case, I should think the defendant might aver against it (*z*); for tho' the rule be, that a man is estopped from averring against any thing in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract.

The application of this to the case at bar is very plain: here the particular circumstances and consideration are set forth, upon which the court is to judge, whether it be a reasonable and useful contract.

[197] The plaintiff took a baker's house, and the question is, whether he or the defendant shall have the trade in this neighbourhood? the concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, (*viz.*) the term of five years.

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained. (*y*)

(*z*) *Collins* v. *Blantern*, 2 Wils. 347.

(*y*) The business of an attorney arising from the confidence which others repose in his personal skill and integrity, it seems doubtful whether a court of *equity* would decree specific performance of a contract for sale of it, *Bozon* v. *Farlow*, 1 Mer. 459. though it has been determined that an agreement by an attorney to relinquish his business, and recommend his clients to another, and not to practise himself within certain limits, is valid in *law*, *Bunn* v. *Guy*, 4 East, 190.

For these reasons we are of opinion, that the plaintiff ought to have judgment. (1)

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(1) So *Chesman* v. *Nainby*, 2 Stra. 739. and 3 Bro. P. C. 349. S. C. (*z*)

(*z*) And see *Gale* v. *Reed*, 8 East 80. *Barrett* v. *Blagrave*, 5 Ves. 555. 6 Ves. 104. *Shackle* v. *Baker*, 14 Ves. 468. *Cruttwell* v. *Lye*, 17 Ves. 335. *Kennedy* v. *Lee*, 3 Mer. 441. *Harrison* v. *Gardner*, 2 Mad. 198. *Baxter* v. *Conolly*, 1 Jac. & W. 576. *Williams* v. *Williams*, 2 Swan. 253. *Bryson* v. *Whitehead*, 1 Si. & Stu. 74.

DE TERM. PASCHÆ, 1712.

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NICHOLS *versus* HOOPER.

CASE 45.

LORD KEEPER HARCOURT.

2 Vern. 686. 1 Eq. Ca. Ab. 202. pl. 22. 2 Eq. Ca. Ab. 559. pl. 4.

Legacy given upon a man's dying without issue; the man dies leaving issue, which issue within six months after died without issue: the legacy not due, it not being intended to rise upon any remoter contingency than the man's dying without issue living at his death.

JOHN Jackson seised in fee devised lands to his wife *Mary* for life, remainder to his son *Thomas Jackson* and his heirs; provided, that if the said *Thomas Jackson* should die *without issue of his body*, then he gave 100*l.* a-piece to his two neices *A.* and *B.* to be paid within six months after the death of the survivor of the said mother and son, by the person who should inherit the premisses; and in default of payment, as aforesaid, then the testator devised the lands to the legatees for payment, and died.

The testator's wife *Mary* died, and the son *Thomas Jackson* died, leaving a daughter, which daughter, within the said six months after the death of her father *Thomas Jackson* died also without issue; the bill was to have the 200*l.*; and for the plaintiffs,

It was urged, that though *Thomas Jackson* left issue living at the time of his death, yet when that issue died without issue, then did *Thomas Jackson* die without issue; that if a man [199] should devise lands to *A.* in tail, and if *A.* died without issue, then to *B.*, if *A.* should leave issue, and that issue should

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afterward die without issue, *B.*'s estate would plainly commence. So if a rent were limited to commence upon tenant in tail's dying without issue, if tenant in tail left issue, that afterwards died without issue, the rent must commence; and it was said to be the stronger, in regard, in this case, here was a death without issue within six months after the death of the survivor; (*scil.*) the issue of *Thomas* died without issue within six months after the death of *Thomas* her father.

Vernon et Cur' cont' : Thomas Jackson is not by this will made tenant in tail, but continues tenant in fee-simple; so that this is not like the limitation of an estate; for it is agreed, that in case of limitation of estates, in construction of law, whenever there is a failure of issue of *J. S.* though *J. S.* died leaving issue at his death, yet from that time *J. S.* is dead without issue.

But where a legacy is given by a will, to commence upon this contingency, (*scil.*) *If J. S. shall die without issue*, this shall be taken according to (*a*) common parlance, (*viz.*) issue living at his death; for, in common parlance, if *J. S.* leaves issue he does not die without issue; and it cannot be intended that the testator designed, whenever there should be a failure of issue of *Thomas*, (which might be 100 years hence,) that then these legacies, which were meant only as *personal* (2) *provisions*, should take effect.

(*a*) Vide post, 432. Target v. Gaunt, & 565. Pinbury v. Elkin. (1)

However, in this case, with respect to the legatees, if the legacies take any effect, the words of the devise pass a legal interest, and the Court does not hinder the plaintiffs from proceeding at law, in an ejectment, but dismisses the bill. (3)

[200]

(1) Yet the more modern cases do not admit this to be the construction arising *ex vi termini*, but intend an indefinite failure of issue, unless the contrary appear from other circumstances. *Beauclerck* v. *Dormer*, 2 Atk. 313. 314. *Saltern* v. *Saltern*, 2 Atk. 376. *Earl of Stafford* v. *Buckley*, 2 Vez. 181. *Bigge* v. *Bensley*, 1 Bro. C. C. 190. *Glover* v. *Strothoff*, 2 Bro. C. C. 33. (*z*)

(2) So *Nicholls* v. *Skinner*, Pre Cha. 528. *Hughes* v. *Sayer*, post. 534. *Keily* v. *Fowler*, 6 Bro. P. C. 309. *Doe* v. *Lyde*, 1 T. R. 593. (*y*)

(3) In 8 Vin. 402. pl. 29. where this case is reported from a MSS. note, it is said the decree was reversed in the House of Lords.

(*z*) *Gray* v. *Shawne*, 1 Eden, 153. *Jeffery* v. *Sprigge*, 1 Cox 62. *Boehm* v. *Clarke*, 9 Ves. 580. *Barlow* v. *Salter*, 17 Ves. 480. *Donn* v. *Penny*, 1 Mer. 20. *Lyon* v. *Mitchell*, 1 Mad. 467. And see *Hodgson* v. *Bussey*, 2 Atk. 89. note 1, 2 Williams's Saund. 388. k. *Rackstraw* v. *Vile*, 1 Si. & Stu. 604.

(*y*) But where a legacy is given to a man and his *representatives*, this excludes the idea of its being intended as a *personal provision*, *Massey* v. *Hudson*, 2 Mer. 130. *Nicholls* v. *Skinner*, ub. sup. which seems an authority against this position, is incorrectly reported. See 2 Mer. 135.

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Note, This differed from the case of *Goodwin* v. *Clark*, 1 Lev. 35. where a settlement was on husband and wife for their lives, remainder to the first, &c. son in tail male, and if the husband should die without issue male, remainder to the daughters for a term of years, for the raising of 1500*l.* for their portions; and the husband died leaving issue a son and a daughter, after which the son died without issue:

Whereupon it was adjudged, that the daughter should have the 1500*l.*; for that whenever the issue male of the husband failed, he might properly be said to be dead without issue male. 8 Co.86. *Buckmere's* case. And this very expectation, remote and precarious as it was, (for there being an estate-tail, a recovery suffered by the tenant in tail would have barred the portions expectant thereupon) was, notwithstanding, of advantage to the daughters with respect to their advancement in marriage; whereas in the principal case, the estate being a fee, no recovery could be suffered thereof, and consequently there was danger of a perpetuity.

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DE TERM. S. TRINITATIS, 1712.

10. Sim. 375.
2. Mer. & Cr. 702.

HERNE *versus* MEYRICK.

CASE 46.

LORD KEEPER HARCOURT.

Salk.416. Gilb. Chanc. 307. 310. 1 Eq. Ca. Ab. 143. pl. 11.

ONE seised of lands in fee, owed money by several bonds, and by will gave several legacies to his younger children, and devised his lands to his eldest son in tail.

One seised in fee owes debts by bond, and devises his lands to his heir in tail, and gives several legacies; after which he dies, leaving the heir his executor; the heir with the personal estate pays off the bond-debts, by which means there are not assets to pay the legacies; the legatees are without remedy, the land being devised in tail to the heir. Otherwise had the land descended to such heir in fee. (1)

The eldest son (who was likewise executor) had paid the bonds with the personal estate; and now the legatees brought their bill, praying that they might stand in the place of the bond-creditors, and be paid out of the lands devised to the

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(1) Vide *Anon.* 2 Cha. Ca. 4. *Culpepper* v. *Aston*, 2 Cha. Ca. 117. *Clifton* v. *Burt*, post. 678. (where this head of cases is more particularly considered) *Tipping* v. *Tipping*, post. 730. *Lucy* v. *Gardner*, Bunb. 137. *Haslewood* v. *Pope*, post. 3 vol. 324. *Lutkins* v. *Leigh*, Ca. temp. Talb. 53.

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eldest son, the late statute against fraudulent devises having made the devise void as against bond-creditors.

And this cause being heard before the Master of the Rolls, his Honor declared, he would marshal the real and personal assets, in such manner, as that the debts and legacies should both be paid, (*viz.*) the legacies out of the personal, and the
[202] bonds out of the real estate, and that as the bonds had been paid by the executor out of the personal estate, so the legatees should, *pro tanto*, stand in the place of such bond-creditors, and be paid out of the real estate.

(*a*) 25 Oct. 1712.

But from this decree there was afterwards an appeal (*a*) to the Lord Keeper, before whom it was urged by the Solicitor General and Mr. *How*, that these younger children were provided for by other land devised to them; and that, in case the legacies were to be charged upon the land of the eldest son, he would be left destitute.

That it was as much the intent of the testator, that the devisee should have the land, as it was, that the legatees should have their legacies; and therefore the one was not to be favoured more than the other; nay, that the rule in equity was, that specific legacies should not be broken into, in order to the satisfaction of pecuniary ones; that if in this case, the devise had been of a lease for *years* to the heir, he should have kept *that*, without having it made liable to the pecuniary legacies, and should the heir be in a worse case, in respect of lands of *inheritance* devised to him, than if he had only claimed a *chattel* by the will?

That the statute of fraudulent devises was entirely out of the case, in regard there were no creditors, and that statute was never made to help legatees.

These reasons seemed to have great weight with the Lord Keeper, who said, it would have been a very different case, had the lands been suffered to descend in fee; whereas the gift in tail to the heir was a specific devise, and, as against legatees, to be favoured equally with a specific legacy. (1)

[203] Mr. *Vernon* on the other side insisted, that the younger children were in nature of creditors, and in case a copyhold, not surrendered, were devised to them, the Court would supply the want of a surrender.

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(1) So *Long* v. *Short*, post. 403. *Clifton* v. *Burt*, post. 679. *Haslewood* v. *Pope*, Vol. III. 324.

Sed per cur', Here it appears the younger children are otherwise provided for.

Vern. The case might have been different, if the testator had devised his land to his eldest son, *exempt* from the payment of his legacies; but those words being omitted in the will, the statute against fraudulent devises charges the land devised with the bonds.

But by Lord Keeper: There being no debts, the statute is out of the case.

Then it was insisted, that whereas in this case one and the same person was heir and executor, suppose they had been different persons, (*viz.*) one person heir, and another executor, and the bond creditors had sued the heir, and recovered their debts out of the real estate, the heir should clearly have had no remedy; and there was no reason that the heir, when made executor, should alter the case, by his partial application of the assets.

However, Lord Keeper inclined, that the heir being devisee in tail of the lands, the legatees should have no remedy to come upon the real estate in the place of the bond-creditors; but said, he would reserve that point; and in the mean time, would direct an account of the personal estate, which, for ought appeared, might be sufficient to pay the legacies as well as debts; and likewise ordered, that precedents should be searched, whether ever a legatee had relief against the heir in such case? (1)

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Afterwards in the case of (*a*) *Clifton* v. *Burt* (*Michaelmas* term 1720) this decretal order of *Herne* v. *Meyrick* (2) was produced, and it appeared, that this case was not resolved by Lord *Harcourt*, but adjourned for further consideration.

(*a*) Which see post. 678. So though the Court will marshal the assets in favour of a simple contract creditor, and (generally speaking) in favour of a legatee, yet where such legatee is a pecuniary one, he will not be relieved by being permitted to come in the place of the bond-creditors upon the land, in the hands of a devisee thereof.

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(1) In *Scott* v. *Scott*, Amb. 383. (*z*) it seems admitted that a legatee cannot have relief against an heir in such case.

(2) Reg. Lib. A. 1712. fo. 137. and in *Forrester* v. *Lord Leigh*, Amb. 174.

(*z*) 1 Eden, 458. S. C.

CASE 47.

DISHER *versus* DISHER.

Lord Keeper HARCOURT.

2 Eq. Ca. Ab. 720. pl. 1.

WILLIAM Disher was a freeman of *London*, and had neither wife nor child, but had an only brother the plaintiff.

A freeman of London signs a note, by which he owns himself indebted in 5000*l.* to his brother and heir; but his brother knows nothing of it; the freeman keeps this note always in his own custody, and on his death it is found among his papers. Adjudged a void note, and as a matter intended, and not perfected. (*z*)

~~10. Sim. 375.~~
~~2. Myl. & Cr.~~

This *William Disher* (though no ways indebted to the plaintiff the brother) by note under his hand dated 24 *February* 1707, promised to pay the plaintiff 5000*l.* but the plaintiff knew nothing of it.

The note was kept by *William Disher* in his own custody, and, at his death, was found among his papers.

April, 1708. *William Disher* intermarried with *Elizabeth Thomas*, and being possessed of 291*l.* 14*s.* 10*d. per annum*, upon banker's assignments, (which are established by act of parliament, and made a perpetual annuity redeemable by parliament, and are thereby to go to executors) and being also seised in fee of lands of 69*l. per annum*, in *Houghton* in *Bedfordshire*, previous to his said marriage, and in consideration thereof conveyed over his lands to trustees and their heirs, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to *Elizabeth* his intended wife for her life, remainder to the first &c. son of the marriage in tail male successively, remainder to the daughters in tail, remainder to himself in fee; and, having assigned over his annuities to the same trustees, did, by another deed, bearing the same date, declare the same to be in trust, that the trustees should pay and apply the said yearly annuities, to such persons, as should be entitled to the profits of the land

[205]

One settles land, on his marriage, on himself and wife, and issue of the marriage, remainder over, and assigns bankers' assignments (which are but personal estate) to trustees, and declares the profits thereof to go to the same person, as by the settlement would be intitled to the land; and if the annuity should be redeemed by parliament, the money to be invested in land, and to be settled to the same uses, and dies. These annuities and bankers' assignments, after the wife's death, shall go to the heir, and not to the executor. (1)

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(1) Vide *Edwards* v. *Countess of Warwick*, post. Vol. II. 171. (*y*)

(*z*) See *Naldred* v. *Gilham*, post. 577. *Ward* v. *Lant*, Pre. Cha. 182, *Colman* v. *Sarell*, 3 Bro. C. C. 12, *Antrobus* v. *Smith*, 12 Ves. 39, *Ex parte Dubost*, 18 Ves. 140, *Cotteen* v. *Missing*, 1 Mad. 176, *Hooper* v. *Goodwin*, 1 Swan. 485.

(*y*) *Lingen* v. *Sowray*, ante, 172. *Cruse* v. *Barley*, post. Vol. III. 20.

so settled as aforesaid; and in case the principal should be paid in according to the act of parliament in that behalf made, that then the trustees should lay out the monies in the purchase of freehold or copyhold lands to be settled to the same uses.

Afterwards Mr. *Disher* died without issue, and leaving no will, but what he had made before his marriage, in which he had given several legacies and bequests, (all which devises were revoked by his subsequent settlement) and had made one *Jacob Sawbridge* who was no relation, but had been his apprentice, his executor.

On a bill brought by the plaintiff *John Disher*, the brother and heir, against the testator's widow and the executor, it was decreed, that these annuities, being redeemable by parliament, were as a mortgage assigned to trustees, and directed, when paid in, to be invested in a purchase, and settled as the fee-simple lands were above settled; and therefore, though the wife was to have an estate for life in the annuities by her jointure deed, yet, after her death, the annuities should not be looked upon as personal estate, a moiety of which, on such construction, would, by the custom of *London* belong to her representatives, but as money directed to be laid out in lands, and to be as a real estate, which, after the wife's death, would go to the plaintiff as heir of *William Disher*. (1)

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Decreed also, with regard to this 5000*l.* note signed by the testator, by which he owned himself indebted to his brother the plaintiff in 5000*l.* that it being always kept by the testator in his own custody, and the brother knowing nothing of it, when given, and at the testator's death it being found among his papers, the same should be looked upon only as a matter *initiate*, or *intended*, and *never perfected:* and though it was urged, that however it must be admitted the note was in fraud of the custom, as to the wife, it should, notwithstanding, be paid out of the dead man's moiety: yet the Court said they esteemed it as no debt at all.

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(1) In *Countess of Holderness* v. *Marquis of Caermarthen*, a perpetual annuity of 4000*l.* issuing out of the revenue of the Post Office, (but redeemable upon payment of 100,000*l.* out of the Exchequer, when the state of affairs would permit, which sum when paid, was to be laid out in the purchase of lands, to be settled in manner there mentioned), was not considered as money to be laid out in land, but merely as a perpetual annuity, inasmuch as there was no certainty of the redemption. 1 Bro. C. C. 377.

DE TERM. S. MICHAELIS, 1712. B.R.

Case 48. DOMINA REGINA *versus* BALLIVOS *et* Burgenses de Bewdley in Comitatu Wigorniæ.

A WRIT of *scire facias* issued out of the petty bag in Chancery to repeal the charter granted to this borough *septimo Annæ Regin'*. Whereupon issue being joined, and the record transmitted into the Crown Office of the Queen's Bench, in *Trinity*-term *undecimo Annæ*, the cause was tried at the bar of that court.

The points in issue were,

1*st*, Whether one *Thomas Smith* was duly elected bailiff on the 25th of *September* 1707 ?

2*dly*, Whether there were a bailiff and burgesses (*i. e.* a corporation) in being at the time of granting this charter ?

3*dly*, Whether that corporation refused this charter ?

[208] The case upon evidence was, in substance, the same with the state of it in the printed sheet: the two former were the principal questions; and the proof upon them was in short this,

As to the first point, it appeared, that by the charter, of *Jac.* 1. all the burgesses (as well common, as capital,) had a right of voting in the election of a bailiff, and that a bailiff might be chosen out of the burgesses.

That *Smith* was a common burgess under that charter, and that he was elected after the invalidity of King *James* II.'s charter was publicly known and acknowledged; and that the common burgesses qualified under the old charter were then admitted to vote, (which had not been done from the time of accepting King *James* II.'s charter, to that day,) and that *Smith* had the majority of those burgesses; but it appeared, that one *Coldwell* the bailiff for the time being, who presided at this election and took the poll, was in by virtue of the void charter, and that he was never so much as a common burgess under the old charter.

That he acted with fourteen capital burgesses, which is the number appointed by the void charter, and that the burgesses qualified by that charter were called, and voted promiscuously with those qualified by the old.

2*dly*, As to the second point, it appeared, that by the charter of King *James* I. the bailiff and capital burgesses were to do all corporate acts, and were originally to chuse in the common burgesses.

That upon the death, or vacancy of any of the capital burgesses, the charter appoints that *residuum capital' burgens' vel major pars eorund'*, shall chuse in others within fifteen days after such vacancy; that they had neglected to fill up vacancies for these twenty-two years last past, and that at the time of granting the charter of her present Majesty, there was only one capital burgess in being (*viz.* one *Slade*) qualified under the charter of King *James* the First. [209]

Upon this evidence several questions in law arose.

1*st*, As to *Smith*'s election, whether that must not be taken to be one entire act done under the direction of the illegal bailiff by virtue of the charter of King *James* the Second, and consequently void; the old burgesses having submitted to be called by that bailiff, and voted promiscuously with the others, without distinction?

2*dly*, Whether according to the charter of King *James* the First, the capital burgesses were not to be taken to be extinct, there being but one remaining?

3*dly*, The capital burgesses being an integral part of the body, by the old charter, whether the corporation could subsist without them, or must, in defect of them be dissolved? (*z*)

After some debate at the bar, the counsel for the defendants prayed a special verdict, and the Chief Justice, in summing up the evidence, directed the jury to reserve these points; for that they were of too great moment to be determined without consideration; but some disputes arising thereupon among the judges, [210]

Parker, Chief Justice said, that the election of *Smith*, to be bailiff seemed to him to be made under the void charter, and that it could not be under any other; that *Coldwell* was bailiff under that charter, and all the voters submitted to his authority, which the old burgesses ought not to have done, but to have insisted upon their ancient right, and opposed the others joining with them; that it was a particular power given by the charter, and in some degree, like the case of *Wroth* v. *Wigs*, 4 Rep. 39. b. very different from the case of electing

(*z*) See *Rex* v. *Pasmore*, 3 T. R. 199. *Rex* v. *Morris*, 3 East 213. 4 East, *Rex* v. *Bellringer*, 4 T. R. 810. 17.

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members of parliament (which had been mentioned at the bar) for there they all come under pretence of the same right, and by a proper authority to chuse.

But supposing *Smith* was duly elected, there was no proper officer to swear him in, neither bailiff, nor recorder, by the charter of King *James* the First; for *Coldwell* was not so much as bailiff *de facto*, but a bailiff of a different corporation, as effectually as if he had been bailiff of another town. To make him a bailiff *de facto* he must have been in under a right constitution; whereas he was in by a void one, and had no pretence of right by the old charter,

As to the second question his Lordship said, he could not think it within the intention of the charter, which appoints the vacancies of the capital burgesses to be filled up within fifteen days, that twenty-two years should be permitted to elapse, till these were all extinct to one man, and that one to have the power of electing all the rest.

[211] As to the third, he thought it a question of great moment, whether this corporation could subsist without capital burgesses, they being made necessary to all corporate acts?

Powell J. could not think the corporation were dissolved for want of capital burgesses, but doubted whether they could act; that it was not material, whether *Coldwell* was a lawful bailiff, or not; for that the corporation might, upon their charter-day, chuse a bailiff, tho' there were none then in being, nor had been for twenty years before; nor like the case of *Wroth* and *Wigs*, for that was of a judicial authority.

† *Eyre* J. thought the third question very considerable, (*viz.*) Whether, if a corporation loses one of its integral parts, it be not dissolved? *vide* 1 *Roll. Abr. pag.* 514. tit. *Corporations;* the case of a corporation consisting of brothers and sisters.

As to the second question, he said, that when a corporation lapses the day of chusing its head, the royal authority must interpose; and in the *interim*, the operation of it ceases. That, in this case, there had not been a regular election of a bailiff for several years.

That if *Smith* was chosen in execution of the charter of *Jac.* 2. tho' at an assembly not under that charter, he was in by virtue thereof; that it was held in the case of the *Devizes*,

† Note; Mr. Justice *Littleton Powis* was absent all this term, being indisposed with the gout.

that a good mayor for the time being, is necessary to the election of another.

Notwithstanding the *court* was so *doubtful* in these points, the *jury* were, however, *very clear* in them; and about three of the clock next morning gave a privy verdict, by which they found all the issues generally for the Queen, and affirmed it at the bar about ten; and tho' they were sent out again by the court, persisted with great obstinacy. [212]

Hereupon the defendants came and moved that the verdict might be set aside, upon these two points:

1*st*, For that the jury had found matter of law, and contrary to direction.

Where the jury bring in their verdict contrary to the direction of the Court, a new trial may be granted, even after a trial at bar.

2*dly*, For that the *venire* was wrong awarded, being *de vicineto de Bewdley*, whereas by the 4th and 5th of Queen *Anne*, *cap.* 16. for the amendment of the law, it ought to have been *de corpore comitatus*.

The court, after advice with the Justices of *C. B.* and Barons of the Exchequer, gave their opinion upon the first point the same term; and the Lord Chief Justice delivered it as the opinion of all the judges of *England*, (except *Powell*) that when the defendant's counsel pray a special verdict, and the court direct the jury to find one, if the jury will take upon them to go contrary to that direction, and find matter of law, it is a sufficient ground for a new trial, even after a trial at bar. (*z*)

For that it would be very unreasonable, that in cases where the court and the jury are *both* of opinion against the party, there he should have a remedy by a bill of exceptions; but that in cases where the jury *only* are of opinion against him, and the court doubtful, he should be absolutely concluded, and without remedy, as he must be in this case.

Powell J. *contra:* I do not very well know upon what foundation of law new trials have been granted; but I found the courts in possession of such a practice as to trials by *nisi prius;* but I do not know that this practice has been established as to trials at bar. Indeed I do remember [213]

(*z*) *Contrà, Argent* v. *Darrell*, 1 Ld. Ray. 514. S. C. 2 Salk. 648; acc. *Musgrave* v. *Nevinson*, 2 Ld. Ray. 1358. S. C. 1 Stra. 584. And see *Farewell* v. *Coker*, post. Vol. II. 564. *Rex* v. *Bennett*, 1 Stra. 101.

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two in the exchequer in my time, but I was always of opinion against them, and that for these reasons, because one is a trial at common law, and the other by special commission only; and because trials at bar are much more solemn, and attended with much greater charge to the parties than the other.

I do not think any thing ought to be a ground for a new trial, after a trial at bar, but what would make the jury liable to an attaint.

Chief Justice: The first case of a new trial, which we find in the books, is that of *Wood* and *Gunston*, in Styles, 462. 466. and that was after a trial at bar. (*z*)

The practice of the courts is the law in these cases; and so of ejectments, and rules for paying money into court, which have no other foundation.

In the case of *Bristol* v. *Cooper*, a special verdict was prayed and directed, and the jury found generally: whereupon a new trial was granted for that reason.

Dowman's case in the 9 Rep. is very observable, about the several duties of judges and jurors in this particular.

In most cases, even where new trials, after trials at
[214] bar, have been denied, the judges have asserted the general right, and one reason why we do not find this practice more ancient, may be, that there are no old reports of motions.

Eyre J. I do not find the reasons for new trials confined to misdemeanors, for which the jury may be fined; the case of *Wood* and *Gunston* was not so.

But if a new trial shall be granted in a case, where the jury have done wrong, in a matter which is properly under their cognizance, I cannot see any reason why it may not be done in cases, where they take upon them to determine matters not within their cognizance. *Vide* 1 *Sid.* 153.

The counsel for the Queen insisted, that this verdict being set aside for a misbehaviour of the jury, and not any fault in the prosecutor, costs ought to be allowed.

But the court said, there was no need of entering into that question, till the matter of the *Venire* was determined; and adjourned the consideration of that till the *Michaelmas* Term following, for the advice of the other judges.

(*z*) But see *Bright* v. *Eynon*, 1 Burr. 394. *Rex* v. *Mawbey*, 6 T. R. 623.

Accordingly in *Michaelmas* term (4 *Nov.*) this point was argued before all the judges of *England* at *Serjeants-Inn* in *Fleet-street*.

Serjeant *Pratt pro def'*: By the statute of the 4th and 5th of her present majesty for the amendment of the law, this *venire* ought to have been awarded *de corpore comitatus*. (*z*)

This is a case within the express words and intention of the act; the words are, "That from and after the first day of *Tri-* [215]
"*nity* term, every *venire facias* in any action or suit in any of "the courts at *Westminster*, shall be awarded of the body of "the proper county;" and this is a suit in the court of chancery in order to repeal the letters patent of the 7th of the present Queen.

Neither is it less within the intention and mischief designed to be prevented, as appears most plainly from the preamble which recites, "That whereas great delays do "frequently happen, by reason of challenges to the array of "panels of jurors, and to the polls, for default of hundred-"ors, for prevention thereof," *&c.* Now this is a proceeding to which that mischief extended; for at the trial there might have been a challenge to the array, for want of hundredors.

That there may be such a challenge in the case of the Crown, is what cannot, I think, be denied; for if the sheriff be commanded to return a jury *de vicineto*, and there is not any hundredor upon the panel, he has not obeyed the command of the writ, and the challenge is for his default.

3 *Keb.* 740. In an information for perjury, a motion was made, that the defendant might not challenge for want of hundredors, and it was denied; because the subject would thereby be ousted of a privilege, to which he is intitled by law.

The statute of 23 H. 8. cap. 13. enacts, that in trials for murder, in corporations, there shall be no challenge for want of freeholders; by which it appears, that there might be such a challenge at common law, in case of the Crown; and certainly where freeholders are necessary, hundredors are [216] equally so.

This act being made for the advancement of justice, it

(*z*) See *Attorney General* v. *Allgood*, Parker, 8.

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ought to have the most beneficial and extensive construction imaginable; but to say that the Crown shall not have a jury *de corpore comitatus*, is to deprive it of the benefit and advantage of an act of parliament.

It is true, that, generally, the Crown shall not be ousted of its prerogative by an act of parliament, unless it be expressly mentioned; but that rule cannot affect this case, for here the Crown had no prerogative: it was liable to the inconveniences recited in the preamble, as well as the subject, and then surely it ought not to be debarred of a share in the remedy.

The intention of this act may be further collected from the next clause, which plainly proves, that the law-makers took it to extend to cases of the Crown; for it expressly excepts all appeals, indictments and prosecutions on penal statutes, and what occasion could there have been for that exception, if the former clause had not taken in any crown cases at all?

But, I think, it deserves to be considered, whether this prosecution be properly a suit of the Crown or not? it seems to be no more than a contention between two corporations, whether the letters patent granted to one side, or those granted to the other, shall prevail? Both are contending for a royal charter, and the Crown is perfectly indifferent who obtains it; the judgment in this case will be only for the benefit of the party, for here can be no judgment of punishment for the usurpation, as in informations in the nature of *quo warrantos*.

[217]

Sir *Peter King*: The words of this act are as general and comprehensive as possible, "every *venire facias* for the trial "of any issue, in any action or suit."

That there might be challenges both to the array, and to the polls, in the case of the Crown, appears from Keilw. 102. a. And this statute is made for the remedy of that mischief in all cases where it might possibly happen before, some few only being excepted by name. But in the present case, Mr. *Attorney General* is contending for the Crown, that it shall not have the benefit of a very useful and advantageous law; this is like a man's disabling himself. Lit. sect. 410.

I know no instance in the law, where the Crown is excluded out of general statutes made for the benefit and advantage of prosecutors. The cases, wherein the Crown is held not

to be bound, are, where it would otherwise be debarred of a precedent right or prerogative; but in the case at bar, the Crown was before this act in the same condition with the subject; and I hope it will appear, that this is not *placitum coronæ*, but at most a civil action brought in the name of the Crown. See Sir *Oliver Butler*'s case, 2 Vent. 344. 3 Lev. 220. In Mr. *Brewster*'s (*a*) case, *Holt* C. J. said, this was a writ of right.

(*a*) 6 Mod. 229.

Tho' taking it either way, *viz.* as a suit of the Crown, or of the subject, this *venire* is wrong, and if so, we are in the only method to take advantage of it: the sheriff has done his duty, and obeyed the command of the writ, and therefore we could not challenge the array, but come to the court to quash it: challenge is for default of the sheriff, where the writ is right; quashing is for error in the writ itself.

Mr. *Salkeld:* The great objection in this case is, that the act of the 4 & 5 *Annæ* is a statute of *Jeofails*, and that therefore this case is not comprehended within it. [218]

This act of parliament consists of distinct branches, which are separate laws; some of them are statutes of *Jeofails*, and others statutes alterative of the common law, and the clause, upon which this question arises, is of the latter sort.

Statutes of *Jeofails* concern such faults as would vitiate the judgment, and make it erroneous, if given, and are to enable the courts to amend such faults, or to overlook them, and to give judgment notwithstanding.

The clause about *venires* is not of this nature, but is an intire alteration of the law in this particular, making that to be right now, which was wrong before, *et sic vice versa*.

Statutes of *Jeofails* make no alteration in the law; for the errors they concern continue so notwithstanding, but only provide a remedy, that they may not prejudice the party.

The chief reason why the statutes of *Jeofails*, have not been held to extend to the Crown is, that such words are used in them as always exclude the Crown, (*viz.*) plaintiff and defendant, demandant and tenant, *&c.* otherwise here.

So far as this is a statute of *Jeofails*, the Crown is not comprehended within it; but so far as it is an act of alteration, the Crown is included.

Thus in the 36 Ed. 3. cap. 15. the first clause changes the course of pleading, and by that the King has been always held to be bound; but the second clause, which provides, "that no man shall be prejudiced for want of form in plead- [219]

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ing, &c." being a law of *Jeofails*, has for that reason been held not to extend to the Crown; so of 16 & 17 Car. 2. cap. 8.

Northey, Attorney General, *pro Reginâ*: The practice of the crown office ever since the making of this act, in all cases of informations, as well in those not excepted, as in those comprised within the exception, has been to award the *venire de vicineto*, and it was never controverted till now. And to this purpose I would apply what I have heard my Lord *Hale* say on like occasions, "that judges ought to have a great regard "to practice, when the matter is not *res integra;* and when "things have gone on in that course a great while, without "being broke in upon."

As to what has been said, that the words of this act extend to cases of the Crown, the 4 H. 6. cap. 3. has words as general, (*viz.*) any process or plea, and yet was never taken to extend to the Crown. The clause in the statute of (*a*) frauds, whereby executions are made to bind from the delivery of the writ to the sheriff, has general words (*viz.*) every writ of execution; and yet the Crown is held not to be bound by them, notwithstanding it had no prerogative in the case before. I wonder to hear this denied to be a suit of the Crown, since the same being brought in the name of the Crown (tho' for the benefit of the party), makes it the suit of the Crown, as in *quo warrantos, &c.*

(*a*) 29 Car. 2. cap. 3. sect. 16.

[220] In a late case of a *quo warranto* of a claim of fishery in several vills, the *venire* was awarded from one only, and held well enough, because tried by a jury of the proper county; so in the case at bar.

If the resolution in this case should be contrary to the received practice, it would shake all the judgments that have been given upon informations since the making of this act.

Raymond, Solicitor General: The words in several other clauses in this statute are as general as in this, and yet the Crown has been held not to be comprehended within them; for instance, that about demurrers, and that about pleading double; *Regina* v. *Foley*, a motion was made for liberty to plead double, and denied, because not within the clause.

The words in some of the former statutes of *Jeofails* are as large and comprehensive as here; however, they have not been held to extend to the Crown; nay, it appears to have been the opinion of the makers of this act, that neither those statutes nor this of the 4th and 5th of her present majesty, could take in crown cases; for they have added a clause at

the end, to extend this and all the statutes of *Jeofails* to suits for recovery of debts owing to the *revenue*, which had been superfluous, if the former clauses had been sufficient.

But if this case be held to be within the 4 & 5 Annæ, I hope the same reason will bring it within other acts of *Jeofails*, which contain words as general and comprehensive, and then it will be helped by 16 & 17 Car. 2. cap. 8. the cause being tried by a jury of the proper county.

Mr. *Lutwyche*: It is considerable, in this case, who is the person that takes the exception to this process, and how he is prejudiced by it? why truly the defendant comes and complains, that he has had a greater advantage put in his power than he should have had; that he has had a liberty of challenging given him, which, by law, he ought not to have had. [221]

The principal reason why the statutes of *Jeofails* have not been taken to extend to the Crown is, because it is not expressly named; and this reason holds in the act of the 4th and 5th of her present Majesty. See the 8th of H. 6. and also the late case of the *Queen* v. *Tutchin*. (*a*)

(*a*) Mich. 3 Annæ.

In Cro. Car. 311. the *venire facias* was awarded from the town, whereas it ought to have been from the manor; and held ill in a *quo warranto*; and that the statute of 21 Jac. 1. did not extend to it; notwithstanding that had an exception of some other crown cases, as in this act.

The clause about pleading double is general, and uses the word [defendant] which is proper for all suits, and yet held not to extend to the Crown.

It is no objection to say, that this is a suit for the benefit of the party; for so are informations in the nature of a *quo warranto*; but that this is properly a suit of the Crown, appears, in that the Attorney-General replies, and the proceedings are in the crown-office; for, if it were not *placitum coronæ*, it should have come on the civil side.

But if this act be taken to extend to the case at bar, there can be no reason why it should not likewise be within the 16 & 17 Car. 2. and it will be no objection to say, that this arises upon a subsequent act, for that statute has always received a very large construction, and been extended even to (*b*) local actions tried in wrong counties.

(*b*) Sed qu.? (*z*)

(*z*) See *Craft* v. *Boite*, 1 Saund. 248. n. 3. *Mayor of London* v. *Cole*, 7 T. R. 583.

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Serjt. *Pratt*, in his reply for the defendants: *Regina* v. *Foley* was an information in the nature of *quo warranto*, which is a criminal proceeding, and besides, the resolution was upon the clause about pleading double, which is not general; for though it uses the word [defendant] which is a general term, yet it is restrained there by other words, (*viz.*) tenant and plaintiff in replevin.

The case of *Tutchin* was upon a mere statute of *Jeofails*; this is an entire alteration of the law.

The clause which extends this, and all the statutes of *Jeofails*, to cases of the Crown, mentions only suits for the recovery of any debt, and therefore cannot affect the present question; and certainly if there be no provision for that purpose, it is impossible that those other statutes should extend to this case, because it arises upon a subsequent statute which has made a perfect alteration of the law in this point.

Sir *Peter King:* As to pleading double, see Poph. 144. The words of the statute of frauds cannot possibly extend to the Crown; for they are, "every writ of *fieri facias*, or "other writ of execution," and *fieri facias* being first named, the subsequent words can only mean executions at the suit of the party.

Mr. *Salkeld:* The 8th Hen. 6. cap. 12. is grafted on the former statute of Hen. 5. and expressly tied down to it, so that no general words can carry it any further.

[223] Nothing can be inferred from any resolution upon the preceding clauses of this statute; for the very words of them exclude the Crown, (*viz.*) 1*st*, party demurring; 2*dly*, plaintiff or demandant appearing by warrant of attorney; 3*dly*, defendant or tenant, or plaintiff in replevin.

After consideration, all the justices and barons were unanimous, and the Lord Chief Justice delivered their opinion in court the same term.[1]

In prosecutions of the Crown, tho' since the late statute of the 4th and 5th of Queen Anne, the venire facias, which was awarded de vicineto, and not de corpore com', held good. (z)

Parker C. J. We are all of opinion, though this clause might have extended to causes of the Crown, had the objection come earlier, yet the constant practice, ever since the making of the act, having been otherwise, and all the precedents both in the crown-office, and in the exchequer, (in cases not expressly excepted) being *de vicineto;* to make a contrary resolution in this case, would be, in some measure, to overturn the justice of the nation for several years past;

(z) See Harg. Co. Lit. 125. a. note 2. 157. a. note 4.

besides, we considered that it is matter of no great consequence; since it only gives the defendant a privilege of challenge, which otherwise he would not have.

It is a rule, indeed, that precedents *sub silentio* are of little or no authority: but that is to be understood of cases where there are judicial precedents to the contrary. But here there are none either on one side or the other.

The Chief Baron mentioned a case in the exchequer, which I remember: it was an information about the draw-back upon salt, and there (as also in some others, both here and in that court) all the exceptions were taken that the wit of man could invent, but this was not so much as mentioned.

We did not think fit to break in upon an entire practice, [224] and shake so many judgments upon a matter of so small moment; and therefore are all of opinion, that the *venire* is well awarded.

The rule must be, that the last trial be set aside upon the other point, on payment of costs.

About three days after this rule for a new trial was pronounced, the defendants moved, that some person might be named to receive the costs, it not appearing certainly, who was the prosecutor in this cause.

Whereupon, Mr. Attorney General named *Borret*, the Queen's solicitor, and acquainted the court that the prosecution was carried on at the proper expence of the Crown.

Afterwards the solicitors on both sides went before the Master, and the costs were taxed on *Saturday* the 22d of *November*. And on the *Tuesday* following, Mr. *Lechmere* made a motion, upon notice, against the taxation of costs in general, and against some *items* allowed by the Master in particular.

The defendant shall pay costs for a new trial on a scire facias being brought by the Crown to repeal a charter.

He insisted, that though they had submitted to a rule for the payment of costs, when the cause appeared, even upon the plaintiff's own shewing, to be merely a contention between the old and new corporations, upon the validity of their several charters; yet now it appeared in another light, and was owned by the Attorney General as a government prosecution, carried on at the charge of the Crown, they ought not to be estopp'd by that rule, from making it a question, whether in the case of the Crown, costs are due by law, this being the first time they took advantage of that point. *Quod fuit* [225] *concess' per cur'.*

To prove that in cases of the Crown, or such as are properly government prosecutions, costs are not due, he urged

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the course of the exchequer, where costs are never paid, unless there be a relator, or some other security to answer costs to the party (*z*); which there was not in this case, nor could there be, because the prosecution was *in rem*, and not *in personam;* and for that he produced a manuscript of Baron *Lechmere*.

That on the Crown side in this court, costs had been so far from being allowed in any case, that it had been thought necessary to provide by (*a*) act of parliament, that there should be a recognizance given to answer costs in some particular cases; but this was none of those; that the law had provided no judgment, nor process for costs, nor method to bring them into the exchequer.

(*a*) Vide 4th & 5th Gul. & Mar. cap. 18.

That if it were otherwise, it would be very unequal; for the Queen paid no costs for not going on to trial; nay, Mr. Attorney might enter a *noli prosequi*, or a *cessit processus*, even when the jury were ready to give their verdict at the bar, without costs to the subject.

In the case of the *Queen* v. *Collins* (*Michaelmas* 10 *Annæ*), in an information for a battery upon a custom-house officer in the execution of his office, a motion was made for costs for not going on to trial; and upon Mr. *Harcourt*'s affirmation, that no costs were ever allowed in government prosecutions, the same was denied.

[226]

That in the case of the *Queen* v. *Clerk*, which was an information for a nuisance, (*viz.*) for erecting copper mills upon the river *Thames*, there was a verdict for the Queen, which by consent was set aside upon payment of costs; the second verdict was for the defendant, who thereupon moved for costs, which were denied for this reason, (*scil.*) because the statute of the 24th of Hen. 8. cap. 8. extends only to trials by *nisi prius*, and not at the bar, as it was in that case.

So in *Hill.* 3. *W. et M.* in *Scacc'* in my Lord *Montgomery*'s case, which was an inquisition on his estate, and but in the nature of an ejectment, there was a verdict for the defendant, and a new trial granted without costs.

That here was no prerogative in the case; for the Queen and subject were on an equal foot; and if the Queen did not pay costs, she ought to receive none.

That this verdict was set aside as unjust, for a misbehaviour to the jury in the face of her Majesty, who was supposed to be

(*z*) See *Attorney General* v. *Ashburnham*, 1 Si. & Stu. 394.

always present in her court of Queen's bench, which court saw plainly, no just judgment could be entered up on that verdict, and yet the defendants were told, that this injustice must be fastened upon them, unless they paid two or three hundred pounds, to be delivered from it; surely this was to pay for justice, contrary to *Magna Charta*, which says *nulli vendemus justitiam.*

That in capital cases, if a jury should obstinately find *generally*, where the court had directed them to find the matter *specially*, the court, no doubt would set aside such verdict, and that without costs; they would not take away the life of a man, because he had not money to pay costs to the Crown.

[227]

Now the consequence of this suit was of equal concern to this corporation, as that of a capital prosecution to the life of a particular person; for the very life and being of this corporation were in question; and if costs were once admitted in the case, those writs of *scire facias*, though they had not yet so harsh a sound in the ears of *Englishmen*, yet he would undertake to prove, they would have ten times more pernicious effects, than *quo warrantos* of old; for a judgment in a *quo warranto* did not destroy the franchise, but a corporation might still, notwithstanding that, have another struggle for its liberty; but in the case of a *scire facias*, the judgment was a repeal of the charter; and if a jury could for once be so managed as to give a partial verdict, it was but getting those costs taxed as a poor borough was not able to pay, and the business would be done; they could not pay the costs, and without that, they should not have a new trial in order to come at right and justice.—This was *laying the axe to the root of the tree.*—The Crown indeed was always an unequal match for the subjects: but if the weight of costs were thrown into the scale, this would become such an addition, as would make its prosecutions † heavier than they would be able to bear.

† By the records in the crown office it appears, that the defendants were, notwithstanding, ordered to pay costs, and that afterwards on a new trial the jury found a special verdict, but this does not appear to have been ever argued.

DE TERM. S. TRINITATIS, 1713.

CASE 49.

CAR *versus* COUNTESS OF BURLINGTON. (1)

LORD CHANCELLOR HARCOURT.

2 Eq. Ca. Ab. 529. pl. 2. A trust term is raised to pay all debts equally, and the party dies indebted by bond and simple contract: the bond creditors may be paid part of their debts out of the personal estate, and shall nevertheless come in upon the trust term for the remainder, equally with the simple contract debts.

RICHARD late Earl of *Burlington*, owing debts by bond and simple contract, made a lease of his lands in *England* and *Ireland* to trustees, in trust to pay all the debts which he should owe at his death; all to be paid in a just proportion without preference of one debt before another, and died thus indebted.

(1) The authority of this case has been much questioned on both its points, *Lloyd* v. *Williams*, 2 Atk. 110. *Barwell* v. *Parker*, 2 Vez. 363. Earl of *Bath* v. Earl of *Bradford*, 2 Vez. 587. (*z*) As to the first point, by Reg. Lib. A. 1712. fo. 595. it appears that the two causes of *Clifford* v. Earl of *Burlington*, and *Car* v. Countess of *Burlington*, came on to be heard on the Master's special report, who stated, "That "the Earl of *Burlington* deceased, by "indenture of 3d *August* 1698, granted "and demised his several estates therein "mentioned to trustees for the several "terms therein mentioned, upon trust, "to raise and pay all such sums of money "as the said Earl should owe at the "time of his death, for servants' wages, "but not to postpone or hinder during "his life the payment of the debts "mentioned in the schedule annexed, "amounting to 35,017*l.* 10*s.* 2*d.* and "such interest as was then due, or "should thereafter grow due, in just "proportions, not preferring one cre-"ditor before another. And after ser-"vants' wages and the debts in the "schedule mentioned, and other inci-"dental charges paid, the said trustees "were to stand possessed of the said "premisses for the residue of the said "terms, in trust for the said Earl, his "heirs and assigns. And by deed poll "dated 4th *August*, 1698, the Earl di-"rected that the several premisses men-"tioned in the deed of 3d *August*, after "the trusts therein mentioned were per-"formed and satisfied, should stand "charged with the payment of all such "debts as he should owe at his death, "*in just and due proportions, not prefer-"ring one person before another.*" It also appeared that great part of the personal estate had been applied in payment of the judgment creditors. "Where-"upon his Lordship declared that the "personal estate of the said Earl of "*Burlington* ought to be first applied "to pay his judgment creditors in a "course of administration, and what "of the said personal estate had been "so applied, the same was well ap-"plied. And as to the question touch-

(*z*) It may in fact be now considered as over-ruled. See *Creuze* v. *Hunter*, 2 Ves. jun. 157. 4 Bro. C.C. 316. S.C. *Shirt* v. *Westby*, 16 Ves. 393.

The bond-creditors had been paid good part of their debts out of the Earl's personal estate by his executors.

Upon which it was now objected, that if these bond creditors would take advantage of the trust term, they ought to waive the benefit of their preference out of the personal estate; that this was the intent of the testator, who could let them into the benefit of the trust term upon what (1) conditions he pleased; and that in equity, a simple-contract debt was as much a debt, and due in conscience, as any other; that equal payments of all debts were favoured in equity, equality being the highest equity.

[229]

But by Lord Chancellor *Harcourt*, the bond-creditors may still come in to be paid the remainder of their debts, in proportion with the simple-contract creditors; for the law gives them the fund of the personal estate, and the party, (*viz.*) the late Earl, gives them the fund of the trust-term; and the clause that no debts shall have preference, must be intended only with regard to their satisfaction out of the trust-term.

" ing what satisfaction the said judg- " ment creditors ought to have for " what shall remain due and unsatisfied " to them by the personal estate, his " Lordship declared that such of the said " judgment creditors, whose debts were " included in the schedule, ought to " come in to receive a satisfaction " equally with other the said Earl's " creditors, who are included in the " said schedule. And that such of the " said judgment creditors whose debts " are not included in the said schedule, " ought to come in to receive such sa- " tisfaction equally with the other cre- " ditors of the said Earl, the payment " of whose debts are provided for by " the said deed of trust of the 4th of " *August*, and doth order the same ac- " cordingly, and for that purpose it is " hereby referred to (the Master) to " see what was due to the said judg- " ment creditors and to carry on in- " terest on such of the debts of the said " Earl as in their nature carry interest, " but the said Master is not to carry on " any interest on any security after the " decease of the said Earl in order to " charge the trust estate with the pay- " ment thereof. And the said Master is " to see what satisfaction the said judg- " ment creditors or any of them have " received by the said Earl's personal " estate; and if there shall be any surplus " of the said personal estate more than " will pay what shall appear due for " principal and interest on the said " judgments due at the time of the " death of the said Earl, then the said " judgment creditors are to have their " interest due to the time they shall re- " ceive a satisfaction, so far as the per- " sonal estate will extend; and if after " the said judgment creditors shall be " so satisfied by the personal estate, " there shall be a surplus of personal " estate left, then the bond creditors of " the said Earl are to have interest for " their debts since the said Earl's death, " until they shall be satisfied, so far as " the personal estate will extend. And " if the said trust estates shall be more " than sufficient to pay all the said cre- " ditors, then the consideration of the " creditors' interest from the death of the " said late Earl is hereby reserved."

(1) Sed vide *Deg* v. *Deg*, post. Vol. II. 416. *Haslewood* v. *Pope*, post. Vol. III. 323. *Morice* v. Bank of *England*, Ca. temp. Talb. 220.

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When a trust is raised to pay debts, simple-contract debts shall carry interest.

His Lordship also declared, that by this trust-term the simple contract debts became as debts due by mortgage, and consequently should (*a*) carry interest as well as the debts secured by bond. (1)

(*a*) Vide post. Maxwell v. Wettenhall, Vol. II. 27.

(1) The decree is otherwise. Et vide contra, *Barwell* v. *Parker* 2 Vez. 363. Earl of *Bath* v. Earl of *Bradford*, 2 Vez. 588. *Shirley* v. Earl *Ferrers*, 1 Bro. C. C. 41, (tho' in *Bothomley* v. Lord *Fairfax*, post. 334. interest was allowed to simple contract creditors under similar circumstances.) (*z*)

(*z*) And see *Creuze* v. *Hunter*, 2 Ves. jun. 157. 4 Bro. C. C. 316. S. C. *Lloyd* v. *Baldwin*, *Bedford* v. *Coke*, *Society for propagating the Gospel* v. *Jackson*, cited 2 Ves. jun. 166. 168. *Tait* v. *Northwick*, 4 Ves. 816. by which latter case a provision by will for payment of the interest of the testator's debts, was held not to extend to a debt by simple contract.

CASE 50.

DARBISON, ON THE DEMISE OF LONG, *versus* BEAUMONT. ON A SPECIAL VERDICT IN EJECTMENT, IN SCACC'.

Fortesc. 18. 2 Eq. Ca. Ab. 331. pl. 3. Devise to the heirs male of *J. S.* begotten, *J. S.* having a son, and the testator taking notice that *J. S.* was then living, a sufficient description of the testator's meaning; and such son shall take, tho' strictly speaking he be not heir. (*z*)

[*230]

JOHN Specot, seised in fee of the manor of *Penheal* and divers other lands, &c. in the counties of *Cornwall* and *Devon*, 19 *Aug.* 1703, makes his will, and after devising the premisses to trustees for the term of twenty-one years, for the payment of debts, &c. he settles the same on the first son of his (the testator's) * body lawfully begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the heirs of his (the testator's) body lawfully to be begotten; and for default of such issue, to his cousin *John Sparke* for 99 years, if he should so long live, remainder to his first, &c. son in tail male; and in default of such issue, remainder to the heirs male of the body of the testator's aunt *Elizabeth Long* lawfully begotten; and for default of such issue, remainder of all his lands to his (the testator's) right heirs.

(*z*) See *Newcomen* v. *Barkham*, 2 Vern. 729. *Bayley* v. *Morris*, 4 Ves. 788. *Doe* v. *Maxey*, 12 East, 601. *Cholmondeley* v. *Clinton*, 2 B. & A. 625. 2 J. & W. 1. Harg. Co. Lit. 24. b. note 145.

The said testator also gives a legacy to his said aunt *Elizabeth Long*, whereby he takes notice that *she was living*, and that she had three sons *A.*, *B.* and *C.* to whom he gives a legacy of 500*l.*

He also gives to *Dorothy Beaumont* (who was his heir at law) an annuity out of the said premisses of 150*l.* *per annum*, and to her children 500*l.* a-piece.

Afterwards the testator died without issue, and *John Sparke* also died without issue; upon which the question was, who was intitled to the testator's real estate? Whether his heir at law *Dorothy Beaumont*, or *A.* the eldest son of the testator's aunt *Elizabeth Long*?

For the heir at law it was objected, that her right was in its nature favourable, and to be supported by the common law of *England*, and therefore all devises that disinherited the heir were to be construed strictly. That to make this devise good to *A.* it must be construed either a contingent remainder or the words [heirs male] be taken as *descriptio personæ*, so as to vest a remainder in him. That as a contingent remainder, it could not be good, because there was no freehold to support it; all the precedent estates being for years; and if it were good as a contingent remainder in its original creation, yet *Eliz. Long* being *living* at the testator's death, such remainder could not by the rule of law vest, as it ought to have done, at the determination of the particular estate; that heirs male of the body of the testator's aunt *Long*, could not be understood by way of *designatio*, or *descriptio personæ*; for *that* is such a description as is *vice nominis*; whereas the word [heirs] did not agree with the person pretended to be described; he was not heir of *Elizabeth Long*, nor could be, while she was living; and [heirs] being a legal term, could be understood only in a legal sense, unless some other word or words accompanying it, should determine the sense otherwise, as heir *apparent*, or heir *now living*; and the word [begotten] did not determine the sense otherwise, because heirs *begotten* (*a*) or *to be begotten* had the same legal construction; and it did not appear that the devisor had any intention to confine that devise to the issue male of *Elizabeth Long* then living, much less to *A.* only, who would take as the heir described by this devise.

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(*a*) 1 Inst. 20. b. 2 Vern. 545. 711. Pre. Cha. 491.; post. Hewit v. Ireland, 427. and Gore v. Gore, post. Vol. II. 33.

But it was adjudged by the whole Court of Exchequer, (except Baron *Bury*,) that *A.* the eldest son of the testator's aunt *Elizabeth Long* was intitled to the premisses, and not the heir at law; which judgment was afterwards reversed by the

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opinion of the two Chief Justices in the Exchequer-chamber; and that reversal at last (1) reversed in the House of Peers; and the reasons upon which the Court of Exchequer gave judgment, and upon which (as it was apprehended) the House of Lords affirmed that judgment, were these:

That *A.* the eldest son of *Elizabeth Long*, was the person designed to take by the appellation of the heir male
[232] of the body of the testator's aunt *Elizabeth Long* lawfully begotten.

As to the objection, that, Mrs. *Long* being living, there could not, in a legal sense, be any heir male of her body begotten to take by the will;

It was answered, that the intent of the testator by the devise (which was the only matter in question,) did plainly appear not only from the words of *that* part of the will, but throughout the whole will.

That the word [heir] had in law several significations: in the strictest, it signified one who had succeeded to a dead ancestor; but in a more general sense, it signified an heir apparent, which supposed the ancestor to be living.

That in this last sense the word [heir] was † used in statutes, law-books and records; and since the law had given to this word several senses, it would be hard to expound it in that which was the strictest, and most rigorous, and would destroy great part of the will; at the same time, that by law it might have another sense, which would support the whole will and intent of the party.

That the intent of the party being the principal rule for the exposition of a will, the testator was excused from using the strict and proper terms and phrases of law, and had liberty to use such expressions as he pleased; for, provided they were such as sufficiently declared his intent, it was enough; and his intent should take place, if by any possibility consistent with the rules of law.

[233] Now the testator in his will took notice, that the sons of his aunt *Eliz. Long* were living, and gave them legacies:

He also took notice, that *Elizabeth Long* the ancestor was living at that time, and gave her a legacy; and therefore could not intend that the first son should take *strictly as* heir, which was impossible if she was living, but as heir *apparent* he might.

† See the writ of ravishment of ward *Quare filium et hæredem rapuit*, and 2 Inst. 439. and 25 Ed. 3. which makes it treason to kill the *heir* of the king.

(1) 1 Bro. P. C. 489.

Again, the testator gave his heir, the defendant, an annuity, and therefore did not intend that she should have the whole estate; and the limitation to the right heirs was expressly in failure of issue male of his aunt *Eliz. Long*, so that the intent was plain, that the apparent heir male of the body of his aunt *Long* (who was the lessor of the plaintiff,) should take before his heir general, who was the defendant *Dorothy*; and that she should not take more than an annuity, as long as there should be issue male of his said aunt *Elizabeth Long*.

That by this construction, every part of the will would stand and be consistent; and the word [heir] would also be taken in a sense that the law allowed of.

But if it were to be construed otherwise, several parts, and some whole lines together, of a sensible will must be expunged, and the heir at law must take, contrary to the express meaning of the testator.

Lastly, That this case was the same with the case of *Burchett* v. *Durdant* (*a*), which had formerly been disputed under the names of *James* v. *Richardson* (*b*), where a devise to the heirs male of the body of *Robert Durdant then living*, was adjudged in * *Westminster-Hall*, and twice affirmed in the House of Lords, to be a good limitation to *George* the eldest son of *Robert Durdant*, tho' *Robert Durdant* was then living; since there could be no great difference between heirs male of the body of *Robert Durdant* then living, and heirs male of the body of the testator's aunt *Long* lawfully begotten; the words *then begotten* being tantamount to *then living*. (1)

(*a*) 2 Vent. 311.

(*b*) 1 Vent. 334. 2 Lev. 232. Raym. 330. T. Jones, 99. Poll. 457.

[234]

(1) So *Goodright* v. *White*, 2 Bla. Rep. 1010.

KENTISH *versus* NEWMAN.

CASE 51.

LORD CHANCELLOR HARCOURT.

HENRY Kentish intermarries with *Mary Hanwell* widow, who (*inter al'*) is possessed of 200*l.* put out on securities, and the husband, before the marriage, articles to lay out

Articles construed against the words for the sake of the intent. As where the wife's portion was to be laid out in land, to be settled on husband and wife, and the heirs of their bodies; and if not laid out in land during their joint lives, and the wife should die first, that the money should go to the wife's brother and sister: wife dies first, leaving issue, and the money is not laid out in a purchase, yet the issue, and not the wife's brother and sister, shall have it; equity supplying the words, "if the wife die "without issue." (1)

(1) So *Targus* v. *Puget*, 2 Vez. 194. (*z*)

(*z*) And see *Uvedale* v. *Halfpenny*, post. Vol. II. 151. *Watts* v. *Guybon*, 3 Lev. 99. 1 Fonb. Eq. 145. note b.

KENTISH v. NEWMAN.

so much money of his own, as with the wife's 200*l.* should purchase 30*l.* a year; and this to be settled on himself and his wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee; but until such settlement made, this 200*l.* is agreed to be taken as the separate estate of the wife; it is also agreed by the said articles, that if no such settlement shall be made during the joint lives of the husband and wife, then the 200*l.* shall be to the sole use of the wife, if living, but if she shall die before her husband, then the 200*l.* to go to her brother and sister.

In 1688, the marriage takes effect, of which there was issue a daughter, the plaintiff; and in *September* 1711, the wife dies, leaving no other issue.

And whether, according to the letter of the articles, this 200*l.* should go to the *wife's brother and sister*, or to the [235] *daughter* (to whom the father by his answer consented it should go in present for her advancement in marriage), was the question?

Decreed, that the daughter should have this 200*l.* and not the wife's brother and sister; for that the intention of the articles was, to provide for the wife, and the issue of the marriage, and not for the brother and sister of the wife; and for that the parents were, by the law of nature, bound to take care of the issue, but not of the wife's brother and sister, who were provided for before, and for whom, though they had been left destitute, still the wife was under no obligation to provide.

That it could not be intended that the wife ever thought of preferring her brother and sister before her own child; and though the words were, *if the wife should die, living the husband, then the* 200*l. to go to the wife's brother and sister*, yet must they be construed to mean, if the wife should die *without issue.*

That even in the case of a conveyance of a legal estate, the words [without issue] had been supplied; thus in Cro. Car. 185. *Spalding* v. *Spalding* (*a*), (the same case cited in 1 Vent. 230.) Lands were devised to *A.* the testator's eldest son, and the heirs of his body, and if he died, living his mother, then to the testator's second son; *A.* died, living his mother, and leaving issue; in which case,

(*a*) See this case cited post. Hewit v. Ireland, 427.

It was objected, that the second son should take, and that these words [if he died, living his mother] were corrective and explanatory of the first words; but resolved

otherwise, and that the court would supply the words [without issue]; for that it could not be intended, that the testator would prefer the second son before the issue of the eldest son; so neither in this case could it be thought, that the wife would prefer her brother and sister before her own child. KENTISH v. NEWMAN. [236]

That this being matter of articles was more under the controul of a court of equity, than if it had been a vested estate; this was trust-money over which the court had a power.

Money to be laid out in land was to be taken as land; and though this money was not invested in land within the time required by the articles, yet the court would dispense with that; and if it had been invested in land within the time, then, by the express words of the articles, it was to go to the issue of the marriage.

Besides, in this case, one of the trustees themselves, (*viz.*) the brother (who was to take advantage of not laying out the money in a purchase), had declared, he would not claim title to the money, if it were not invested during the joint lives of the husband and wife; which declaration might naturally be presumed to have been the reason why the money was not laid out.

Also it was the duty of the trustees to call upon the husband to lay out the money and make the purchase; instead of which, one of them, by declaring he would not take the advantage of any omission of that kind, had encouraged him to sit still, so that if such trustee were to have the money, he would reap a benefit from his own wrong. Trustees not to take advantage of their own latches.

[237]

Ex parte SMITH. ON PETITION

CASE 52.

LORD CHANCELLOR HARCOURT.

A. Lends money to *B.* and *C.* on their bond, *B.* becomes a bankrupt, and the commissioners assign his estate in trust for his creditors:

A. sues the bond against *C.* the other obligor, and recovering judgment against him, takes him in execution by *ca' sa'*, and *C.* thereupon paid *A.* 24*l.* but *C.* being old, having no estate, and living only upon charity, *A.* consented to discharge *C.* out of execution.

2 Eq. Ca. Ab. 104. pl. 1. *A.* lends money to *B.* and *C.* on bond, *B.* becomes bankrupt, and his estate assigned by commissioners; *A.* sues *C.* and takes him in execution on a ca' sa', and afterwards consents to his escape; yet *A.* shall come in as a creditor of the bankrupt for a moiety of his remaining debt.

EX PARTE SMITH.

Upon which it was objected, that this being an escape with the consent of the plaintiff the obligee, and the debt being, in law, *intire*, it was a discharge of the *whole* debt, and should operate, as well for the benefit of *B.* the bankrupt, the other obligor, as of *C.*(1)

But it was answered, that the bankruptcy of *B.* and the assignment of his estate were prior to the execution taken out against *C.*, and by that assignment *A.* the plaintiff had an interest in the estate of *B.* the bankrupt; which interest could not be discharged by *A.*'s taking out an execution afterwards against *C.* the other obligor, any more than if two were bound in a bond to me, and I should recover judgment and take out an execution by *fi' fa'* against one, and afterwards, on obtaining a judgment, sue out an execution by *ca' sa'* against the other, and then consent that the latter shall escape, this will not discharge the execution on the *fi' fa'*, which was before completed against the former obligor; and that still this was harder doctrine in equity.

[238] *Lord Chancellor:* Let *A.* the petitioner, who is the obligee in the bond, come in as a creditor before the assignees, for a moiety of the remaining money due on the bond; for the execution against *C.* being subsequent to the assignment of the estate of *B.* the bankrupt, shall not (at least in equity) discharge *A.*'s demand out of the estate of the bankrupt; but in regard, each, in equity, was liable but to *half* the debt, and *C.* was not the original debtor for the whole, *A.* the petitioner shall only have relief for a † *moiety* of his remaining debt against the assignees of *B.* the bankrupt,

But Lord Chancellor said, if *B.* the bankrupt had been the original debtor, and had borrowed *all* the money, then *A.* should have come in before the assignees as a creditor for *all* his debt. (2)

† *Qu.* Why should not the petitioner, in this case, be allowed to come in for the remainder of his whole debt out of the effects of the bankrupt, since each of the obligors was liable to him for the whole?

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(1) *Bower* v. *Swadlin*, 1 Atk. 294. Harg. Co. Lit. 232. a. note 1. (*z*)

(2) Vide Ex parte *Ryswicke*, post. Vol. II. 89.

(*z*) Anon. 1 Mod. 45. *Whitacres* v. *Hamkinson*, Cro. Car. 75.

DE TERM. S. MICHAELIS, 1713.

BRODERICK *versus* BRODERICK. (1)

CASE 53.

LORD CHANCELLOR HARCOURT.

4 Vin. Ab. 534 pl. 3. 2 Eq. Ca. Ab. 244. pl. 14. 480. pl. 11. Devisee

One devises lands to *J. S.* and his heirs, and duly subscribes his will in the presence of three witnesses; but the witnesses, for the ease of the testator, go down stairs into another room, and attest the will there, which is out of the presence of the testator.

under a will defectively executed, represents the will duly executed, and for a small sum gains a release from the heir; release set aside.

3. Vinf. Abr. 99.

Afterwards the heir at law, in consideration of 100 guineas paid him by *J. S.* the devisee, does by deed, reciting that this will was duly executed, release to the devisee all his right to the estate devised; and after that, there being debts appointed by the will to be paid, the devisee tells the heir, that it would facilitate the raising the money for the payment of the debts, if he (the heir) would join in a lease and release of the devised premisses; and thereupon, for fifty guineas more paid to him, he (the heir) together with the devisee, by lease and release, conveyed the premisses to *J. N.* and his heirs, in consideration of 4000*l.* mentioned to be paid by *J. N.* and a receipt was given for the money; but, in truth, this purchase money was not paid, but *J. N.* was a trustee only for the devisee, and so admitted to be by the answer.

[240]

On a bill brought by the heir to be relieved against the conveyances executed by him,

For the devisee it was said, that the will, as to the devisor, was executed, and the form of the witnesses subscribing in the presence of the testator, was only prescribed by the statute of frauds, to prevent a rash disinherison of the heir; but since the executing of the will was fully proved, though the circumstances required by the statute had not been observed, yet it was the plain intention of the testator, that the devisee should have the estate; and the devisee having the legal estate, it would be hard to take it from him in equity, and by that

(1) The state of this case in 4 Vin. Ab. 534, is rather fuller, and corresponds with the Register's Book, Lib. A. 1713. fo. 130.

BRODERICK *v.* BRODERICK.

means to dispose of the estate against the intent of the testator, from the devisee, for want of a ceremony, when the end of that ceremony was answered, by its being made to appear, undoubtedly, that the testator did sign and seal this will.

Suppressio veri, or suggestio falsi, is, each of them, a good reason to set aside any deed or conveyance.

Cur': Either *suppressio veri*, or *suggestio falsi*, is a good reason to set aside any release or conveyance: now to recite in a deed (as in this case) that the will was duly executed, when it was not, is *suggestio falsi*, and to conceal from the heir (as in this case) that the will was not duly executed, is *suppressio veri*; so that both circumstances concur.

And though there was one witness, who, upon the last general interrogatory, swore, that the heir did declare to him, that the will was not worth any thing, and that the heir made such declaration before his executing the release, yet this was not regarded.

[241]

For Lord Chancellor said, it was not to be believed, that if the heir knew that the will was not duly executed, he would, for so small a consideration, have parted with his estate.

So the Court relieved against the release, and the lease and release; but ordered the heir to pay back the 100 guineas, and also the 50 guineas with interest. (1)

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(1) Vide *Jervis* v. *Duke*, 1 Vern. 20. *Pusey* v. *Desbouverie*, post. Vol. III. 315. *Jevers* v. *Jevers*, 4 Bro. P. C. 199. *Scrope* v. *Offley*, 4 Bro. P. C. 237. *Meade* v. *Webb*, 4 Bro. P. C. 497. *Ramsden* v. *Hylton*, 2 Vez. 304. *Evans* v. *Llewellyn*, 2 Bro. C.C. 150. (*z*) But for the several grounds on which courts of equity exercise jurisdiction in setting aside deeds, &c. vide *Osmond* v. *Fitzroy*, post. Vol. III. 129.

(*z*) *Cann* v. *Cann*, post. 727. *Preston* v. *Wasey*, Pre. Cha. 76. *Pickett* v. *Loggon*, 14 Ves. 215. *Leonard* v. *Leonard*, 2 Ba. & Be. 171.

CASE 54.

CHURCHILL *versus* LADY HOBSON *et al'*.

LORD CHANCELLOR HARCOURT.

SIR *Charles Hobson* did, in his life-time, place great sums of money in the hands of one *Goodwyn*, a banker, who, at that

Salk. 318. 1 Eq. Ca. Ab. 247. pl. 2. Two executors join in a receipt, and only one of them actually receives the money; both chargeable to creditors, but not to legatees. Two trustees join in a receipt, and one receives the money; only the receiving trustee shall be charged. (1)

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(1) Vide *Fellowes* v. *Mitchell*, ante 81. *Aplyn* v. *Brewer*, Pre. Ch. 173. *Anon.* Mos. 35. *Leigh* v. *Barry*, 3 Atk. 584. Ex parte *Belchier*, Amb. 219.

time, and for a considerable time afterwards, was a person of very great credit, and was cashier to very many monied persons.

CHURCHILL *v.* LADY HOBSON.

Westley v. *Clarke*, ante, 83. (note). (*z*) *Read* v. *Truelove*, Amb. 417. *Sadler* v. *Hobbs*, 2 Bro. C. C. 114. *Scurfield* v. *Howes*, 3 Bro. C. C. 90. From *Sadler* v. *Hobbs*, it appears agreed, that a *trustee* shall not, by the *mere* act of joining in a receipt, become liable to answer the money in fact received by his co-trustee; but (notwithstanding the inclination of Lord *Harcourt* and Lord *Northington* to favour executors under similar circumstances) where by any *act done* by one *executor*, any part of the estate comes to the hands of another executor, the former will be answerable for his companion in the same manner, as if he had enabled a stranger to receive it.—In *Westley* v. *Clarke*, as the Lord Chancellor observed in giving judgement in the case of *Sadler* v. *Hobbs*, *Thompson* had actually received the money without the concurrence of the co-executors, and they signed the receipt *afterwards;* and that therefore was *not an act which put it in the power of* Thompson *to get at the money*, since in fact he had it at the time; and his Lordship added, that, according to a note of that case, with which he had been furnished by the then Master of the Rolls (Sir *L. Kenyon*), Lord *Northington* said, he should have thought the co-executors *liable*, if they had been present at the time when the money was paid.—As to *Churchill* v. *Lady Hobson*, perhaps the circumstance of *Goodwyn*'s having been the testator's banker, might have had some weight in the determination. (*y*)

(*z*) 1 Eden 357.

(*y*) The decision is expressly put upon that ground by Lord *Hardwicke* in *Harrison* v. *Graham*, 3 Hill's MSS. 239, which case was as follows. *Barbara Graham* by will appoints her mother, her sisters *Margaret* and *Elizabeth*, and her brother *Robert*, her executors, and dies. *Margaret* alone proves the will, and acts chiefly as executor, and is described as the only acting one, in a letter of attorney executed by the others, who are therein described as executors, to empower *Margaret* to receive a quantity of stock. *Robert*, by virtue of another letter of attorney, executed by the other executors, transfers a quantity of the testatrix's S. S. Stock, receives the money, and pays it over the same day to *Margaret*. After this she and the mother die, making *Robert* their executor. It did not appear that *Robert* had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other. The question was, whether this was such an act of administration in *Robert*, as should make him chargeable as to his own estate. The master had charged him, and the case came on, on exceptions to the report. Lord *Hardwicke:* The question in this case is, whether or no this defendant has acted as an executor, and consequently whether he is chargeable? I agree that there may be cases where an executor may act as an attorney to the other executors. If an executor renounces, and then acts under a letter of attorney, it is no administration, for it depends on the nature of the act, accompanied with any other acts. Here is a will and four executors. The will is proved by one only, with a reservation of the rights of the other three. Here appear to have been acts done by them all, and a letter of attorney given by the defendant together with the other executors to *Margaret*, who indeed is described therein as the only acting executrix. But the defendant describes himself there as an executor. This was clearly acting as an executor. Then he afterwards accepts another letter of attorney from *Marga-*

CHURCHILL v. LADY HOBSON.

Sir *Charles* dies, and leaves the plaintiff *Churchill* and *Goodwyn* executors, after whose death, *Goodwyn* continuing in the same credit, the plaintiff *Churchill* paid 500*l.* of the money of his testator Sir *Charles* into *Goodwyn*'s hands, and several of Sir *Charles*'s debtors, on paying in their debts, did require, that when they paid their money to the executor *Goodwyn*, his co-executor *Churchill should join in the receipt for this money*, which accordingly was done. But upon the plaintiff *Churchill*'s joining in the receipt, *Goodwyn* did, on every such payment, give a note to *Churchill*, by which it was acknowledged, that though the plaintiff *Churchill* had joined
[242] in the receipt, yet it was he, *viz.* Goodwyn *only, who received the money*, and the money which *Goodwyn* thus received, and on payment whereof *Churchill* joined in the receipt, amounted to 1100*l.* after which *Goodwyn* broke, and became insolvent.

The bill was brought by *Churchill*, to be discharged of th executorship, and to be indemnified against the bankruptcy of *Goodwyn*.

Whereupon it was now objected by Mr. *Vernon*, that the plaintiff *Churchill* having joined in the receipts, this made

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ret, and the rest of the executors. Shall executors be allowed to discharge themselves at their pleasure from being liable to assets? Money comes into his hands, he pays it over to *Margaret:* this can't discharge him. As for the case in 1 Will. 243, it must have turned on the other executor's being a banker, and as such, trusted by the testator in his lifetime, besides being made his executor at his death. For my own part I think the master has erred in not charging the defendant with the other monies received by *Margaret* by virtue of the other letter of attorney. For there is a difference between trustees and executors in this case. Trustees are not liable for monies received by other trustees where they have joined in an act, because of the necessity of their joining to make it valid. But where an executor merely as executor joins in the receipt of a sum of money, he shall be charged, though the other in fact received the money; because his joining was quite an unnecessary act. *Murrell* v. *Cox*, 2 Vern. 570. In the present case the S. S. Company have not thought his receipt as executor at all necessary, for the transfer shews on the face of it, that it was not required.—However, *Westley* v. *Clarke* is approved by Lord *Alvanley* in *Hovey* v. *Blakeman*, 4 Ves. 608. and the relaxation of the old rule as to executors, though disapproved in many subsequent cases, seems to be admitted to this extent, that the signature of a receipt by an executor shall not charg him, where it appears that the money has previously come to the hands of his co-executor, so that he does not by giving such receipt abandon any controul over it, or authorise the payment. *Bacon* v. *Bacon*, 5 Ves. 331. *Chambers* v. *Minchin*, 7 Ves. 197. *Brice* v. *Stokes*, 11 Ves. 323. *Langford* v. *Gascoigne*, ib. 333. *Joy* v. *Campbell*, 1 Sch. & L. 341. *Doyle* v. *Blake*, 2 Sch. & L. 231. *Shipbrook* v. *Hinchinbrook*, 16 Ves. 477. *Underwood* v. *Stevens*, 1 Mer. 712. *Walker* v. *Symons*, 3 Swan. 63. And see *Balchen* v. *Scott*, 2 Ves. Jun. 678.

him liable for the whole money: he admitted, that in the case of (a) *Fellowes* v. *Owen*, where *A.* and *B.* were trustees in a mortgage for 2000*l.* and they both joined in a receipt for the whole money (whereas in fact, they had received each but 1000*l.*); that though Lord Keeper *Wright* † had decreed each should be liable for the whole, in respect of the receipt that had been given, yet Lord *Cowper* reversed that decree, conceiving it to be against natural justice, that one should be liable for the receipt or act of another; though this had been so decreed in the case of two *trustees*, yet in the case of *executors* it was otherwise. Because, as one executor alone might give a discharge, the joining of the other was an unnecessary act; for which reason if the money were lost, each should be liable; that accordingly, it was thus held in the case of *Wilkins* v. *Allen*, and more particularly in that of *Murrel* v. *Pit* (1), decreed, first, by Sir *John Trevor* at the Rolls, and affirmed afterwards on appeal by Lord *Cowper*.

CHURCHILL v. LADY HOBSON.

(a) Ante 81.

Sed per Lord Chancellor *Harcourt:* It seems to me unreasonable, that one man should suffer for the default of another; at least the difference ought to be between the case of (2) a creditor and that of a legatee. In the case of creditors, who are intitled to the utmost benefit of the law, the joining of the executors in the receipt, may make each liable for the whole; but when legatees, or such as claim under the statute of distribution, are the only persons concerned, and who have no remedy for their demand but in equity, it is altogether unequitable, that one executor should answer for the receipt of the other, the joining in the receipt being but matter of form; whereas the substantial part, and which alone is to be regarded in conscience, is the actual receipt of the money.

[243]

Neither do I think the executor *Churchill* ought to be chargeable for the 500*l.* by him paid to *Goodwyn*, he having been the cashier with whom the testator in his life-time chose to intrust his money, and therefore the executor ought not to suffer for having trusted him whom the testator himself in

† It seems as if Lord Keeper *Wright* had only intimated an opinion of that kind, since it does not appear by the register-book that he made any decree in that cause.

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(1) 2 Vern. 570.

(2) This distinction is not made by the decree, nor has it been adopted in later cases. Vide *Sadler* v. *Hobbs*, 2 Bro. C. C. 117.

CHURCHILL v. LADY HOBSON. his life trusted, and at his death made one of his executors. (1)

(1) Reg. Lib. A. 1713. fo. 220. The decree is as follows, "That it be referred to Mr. *Orlebar* to take an account of the personal estate of Sir *Charles Hobson*, received by the plaintiff, and *Goodwyn*, or either of them, or by any person for their or either of their use, in the taking of which account, if the said master shall find that the said plaintiff joined with the defendant *Goodwyn* in giving receipts for any sums of money which were paid to the defendant *Goodwyn*, or if the plaintiff received any sums of money, as part of the testator's estate, and paid the same over to *Goodwyn* before the date and issuing of the commission of bankruptcy against him, the plaintiff is to be discharged thereof, and all such sums of money are to stand charged on the defendant *Goodwyn* only, and the said plaintiff as executor, is to have a satisfaction for such sums of money so come to the hands of the defendant *Goodwyn*, in proportion with his other creditors, and after payment of the said testator's debts and legacies, it is ordered that the surplus of the said testator's personal estate be divided according to the directions of his will."

[244]

8. Sim. 94.
2. Keen. 696.
42. Ch. D. 394.

DE TERM. S. HILLARII, 1713.

CASE 55.

BEALE *versus* BEALE. (z)

LORD CHANCELLOR HARCOURT.

The eldest daughter, where there is a son, or where the estate by a settlement goes all to a remainder-man, is a younger child in equity. (1)

A. Was tenant for life, remainder to his first, &c. son in tail male, remainder to his brother *B.* in tail. *A.* having no issue, *A.* and *B.* joined in a recovery, to the use of *A.* for life, remainder to such woman as *A.* should marry for her life, remainder to the first &c. sons of *A.* in tail male, remainder to *B.* the brother in tail male, remainder to *A.* in fee,

(1) The Court will indulge this latitude of construction in cases of *portions*, for the sake of providing for all branches of the family. *Chadwick* v. *Doleman*, 2 Vern. 528. *Heneage* v. *Hunlocke*, 2 Atk. 456. *Lord Teynham* v. *Webb*,

(z) Reg. Lib. A. 1713, fo. 664.

BEALE v. BEALE.

With a power to *A.* by deed, or will, to charge the premisses with any sum not exceeding 2000*l.* for portions for younger children, sons or daughters, who should be *living at his death*, in such proportions as he should think fit.

A. marries, and has issue two daughters only, one of whom was born *after his death.*

A. by his will charges the premisses with 2000*l.* to his daughter *Mary* payable at twenty-one, or marriage; but if the child with which his wife was then ensient, should prove a daughter, then he directs that the 2000*l.* should be equally divided betwixt them. [245]

A. dies, and the two daughters, being of very tender years, bring their bill for the raising of this 2000*l.* out of the reversionary estate, and to have interest in the mean time for their maintenance.

Objected, the *elder* daughter is not entitled to any part of this 2000*l.* because it was only to go to the *younger* children and the *younger* daughter cannot claim any part of it, because she was *not living at the time of* A.'s death, and by the words of the settlement, the 2000*l.* was to go to the *younger* children that *A.* should have *living at his death.*

Cur': The eldest daughter, tho' first born, when there is a son, has been often ruled to be as a younger child. (*a*)

(*a*) Vide post, Butler v. Duncomb, 451.

Every one but the heir is a younger child in equity, and the provision which such daughter will have, is but as a younger child's, in regard the son goes away with the land as heir; so here, the estate by the settlement goes all to the remainder-man, who is *hæres factus*, and neither of the two daughters is heir; wherefore the elder daughter having no more than the younger, is (as to this provision) a younger child, and consequently capable of taking it. [* 246]

* As to the other objection, it would be very hard in a court of equity, that a child, because it happened not to be born at

Power to charge lands for portions for younger children living at the father's death. A child in ventre sa mere is a child within the power.

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2 Vez. 198. *Duke* v. *Doige*, (cited) 2 Vez. 203. (in which last case an *eldest son unprovided for*, was considered as a younger child) *Pierson* v. *Garnet*, 2 Bro. C.C. 38.: but the same construction is not applicable to *other* cases. *Lord Teynham* v. *Webb*, ub. sup. *Hall* v. *Hewer*, Amb. 203. (*y*)

(*y*) And see *Jermyn* v. *Fellowes*, Ca. tem. Tal. 93. *West* v. *Primate of Ireland*, 3 Bro. C. C. 148. 2 Cox. 258. *Emery* v. *England*, 3 Ves. 232. *Lincoln* v. *Pelham*, 10 Ves. 166. *Bowles* v. *Bowles*, ib. 177. *Savage* v. *Carroll*, 1 Ba. & Be. 265.

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such a time, must, therefore, be unprovided for but as the law in many respects, regards an infant in *ventre sa mere*, so as to allow such child to be (*a*) vouched; also as the mother may be guilty of the murder (*b*) of a child in *ventre sa mere*, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison: so there is more reason that equity should consider such child, in order to its being *provided for*; and therefore this posthumous child may be well looked upon, in equity, to be (*c*) *living at her father's death* in *ventre sa mere*.

(*a*) 1 Inst. 390.

(*b*) 3 Inst. 50, 51.

(*c*) Post, 342. Northey v. Strange. Vide also the case of Burdet v. Hopegood, post 487.

Where lands are settled on *A.* for life, remainder to such woman as he should marry for life, remainder over, with power to charge the premisses with any sum of money, such power, unless there be a clause inserted to the contrary, will, like a power of leasing, over-reach all the estates.

And with regard to that part of the bill, which prayed to charge the remainder only, with this 2000*l.* portion, the court held, that the power, and the charge made pursuant thereto, did affect the wife's estate for life (*z*), as well as the remainder, and that it was like a power of leasing, which over-reaches all the estates; for which reason it is usual to insert a proviso in such power of charging, that it shall not prejudice the jointure, or other precedent estates.

(*z*) Lord Cowper however, on appeal, left this point undecided, See Pre. Cha. 405. But *Stackhouse* v. *Barnston*, 10 Ves. 453, was decided in conformity with Lord Harcourt's doctrine. And see *Mosley* v. *Mosley*, 5 Ves. 248.

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DE TERM. S. TRINITATIS, 1714.

CASE 56.

JENNER *versus* HARPER.

LORD CHANCELLOR HARCOURT.

Salk. 163. Gilb. Chanc. 340. Gilb. Eq. Rep. 44. Pre. Cha. 389. 2 Eq. Ca. Ab. 191. pl. 5.

TENANT in tail of the manor of *Widhill*, in *Berks*, made a nuncupative will, which was afterwards reduced into writing; and by it he devised, that his executors should purchase a parcel of ground in *Cricklade* in *Wilts*, for the erecting of a free school there, and gave to the said school 20*l. per annum rent*, to be paid out of his said manor of *Widhill*, and died.

Devise by nuncupative will, by tenant in tail, of rent out of land to a charity, void, though the will was made before the statute of frauds.

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The will was made, and the party making the same died before the statute of frauds and perjuries; and the will was proved in the Spiritual Court as a nuncupative will. In pursuance of the will the executors bought the ground in *Cricklade*, and built the school thereupon, and the commissioners for charitable uses decreed the issue in tail of the manor of *Widhill* to pay the arrears of the 20*l. per annum* rent to the school.

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The issue in tail upon this, except to the decree, and the exception coming on before Lord Chancellor *Harcourt*, it was insisted for the decree, that though this was void, as a *will*, yet it was good as an *appointment*, by virtue of the statute of 43 Eliz. cap. 4. of charitable uses; as if tenant (*a*) in tail had devised land without having levied a fine, or suffered a recovery; or a copyholder had devised his copyhold to charitable uses, without surrendering it to the use of his will; such devises would be made effectual.

(*a*) 2 Vern. 453, 454. Devise by tenant in tail to a charity good, though no fine levied, or recovery suffered previous thereto.

But after time taken by Lord Chancellor to consider of this matter, his Lordship allowed the exception, and reversed the Commissioners' decree, for as much as, at common law, lands or a real estate, were not deviseable; and by the statute of 32 H. 8. it is as much required that a will of lands should be in writing, as by the statute of frauds and perjuries it is required that such a will should have three witnesses; and as in *Johnson*'s (*b*) case decreed by the Lord Chancellor *Cowper*, a devise of land in writing to a charity, since the statute of frauds, but not attested by the three witnesses, was held to be void; so a devise of land without writing should be void also, especially, it being by tenant in tail, and of a rent too, which cannot pass but by deed; and it would be very dangerous to allow of nuncupative wills of land.

(*b*) 2 Vern. 597. Pre. Cha. 270.

Sed quære, et vide Duke's Charitable Uses, 81. *Stoddard*'s case, where one, before the statute of frauds, devised a rent of 10*l. per annum*, out of lands to a charitable use, and willed that one *Hugh*, the scrivener, should put it into writing, which was accordingly done, and decreed, that this nuncupative will was good; for "though a rent cannot be *created* without deed, "yet, by the words of 43 Eliz. it may be *appointed* without "deed, and though the nuncupative will be void as a *will*, it "is good as an *appointment*"; and it seems that the statute of 43 Eliz. which makes these appointments to charities good, being subsequent to the statute of 32 H. 8. of wills, supersedes and repeals that statute; but it is true, that the statute of frauds and perjuries, being subsequent to the statute of

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JENNER *v.* HARPER.

43 Eliz., does repeal that statute; and therefore, since the statute of frauds, &c. an appointment of lands to a charity, by a will not attested by three witnesses, is void.

CASE 57.

MILES *versus* WILLIAMS ET Ux'.

10 Mod. 160. 243. Resolution of the Court of B. R. that the debts *of* the wife, dum sola, are discharged by the bankruptcy of the husband, and that debts due *to* the wife, dum sola, though unrecovered, are assignable by the Commissioners on the husband's bankruptcy (*z*), per stat. 4 Ann. cap. 17. and that the plea upon that act must conclude to the country.

MILES brought debt *versus* baron and feme, upon a bond entered into by the feme *dum sola*. The defendants jointly plead in bar, *quod querens action' non, &c.* and say that after the intermarriage, (*scil.*) *in Septemb. anno* 5 *Annæ, Williams* the husband became a bankrupt *infra intention' separal' statut' contra decoctor' edit' et provis'*, and that a commission *supr' separal' statut' decoctor'* issued under the great seal, bearing date *tali die*, and directed to *M. K.* and *T. A. &c.* afterwards, (*scil.*) *tali die*, the said *Williams* voluntarily surrendered himself to the major part of the commissioners, and from time to time submitted himself to be examined upon oath by the said commissioners, *et in omnibus se conformavit ad statut'* 4 *Annæ intitulat'*, An act to prevent frauds frequently committed by bankrupts, *et ad omnia al' statut' contra decoctor' edit', et sic idem* Johannes *et* Eleonora, *vigore stat' prædict' in prædict' parliament' dict' dom' reginæ nunc edit', dicunt, quod causa action' prædict' accrevit præfat'* Miles *antequam idem* Johannes Williams *devenit decoctor: et hoc parat' sunt verificare; unde pet' jud' si prædict'* Miles *action', &c.*

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The plaintiff demurred, and shewed for cause, that the debt arising upon a bond made by the wife, *dum sola*, was not discharged by the statute mentioned in the defendants' plea; and also that the plea ought to have concluded to the country.

The defendants joined in demurrer.

And after several arguments in this case, *Parker*, C. J. having stated the record at large, delivered the resolution of the Court.

The two great questions which have been made in this case, are these:

1*st*, Whether this, being a debt on a bond given by the wife, *dum sola*, be such a debt as shall be discharged by the

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(*z*) In *Ex parte Blagden*, 2 Rose 249, however, it was held that a debt due to the wife *dum sola*, could not be set off against a debt from the husband, on his becoming bankrupt, under st. 5 Geo. 2. c. 30. s. 28.

bankruptcy of the husband by virtue of the statute of 4 Annæ, cap. 17. mentioned in the plea?

2dly, Whether the defendants have well concluded their plea, or not, it being to the judgment of the Court, and not to the country?

As to the *first*, we are all of opinion, that it is a debt within the act.

The words of the clause, upon which it depends, are, (*a*) "that the bankrupt shall be discharged from all debts by him "due and owing at the time he became bankrupt; and then, "in case he be sued for any such debt, the act directs, that "he shall and may plead in general, that the cause of action "did accrue before he became bankrupt."

(*a*) Sect. 7.

Upon these words the immediate question is, whether this was a debt due and owing by the husband, at the time he became bankrupt?

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It was said, and (I think) admitted at the bar, that a debt due *by* the wife, and one due *to* the wife, *dum sola*, must fall under the same consideration.

This is very reasonable, and therefore I have considered how far a debt due to the wife would be within this act to be assigned by the commissioners of bankruptcy? and in order to understand this, it is necessary to go back to the former acts.

Debts due to the wife considered. (1)

13 Eliz. cap. 7. enacts, that the commissioners shall take order with the bankrupt's body, lands and tenements (as well freehold as copyhold,) goods, chattels, debts, &c. and sell the same, &c.

Then comes the statute of 1 Jac. 1. cap. 15. which, reciting that the authority given to the commissioners by the former act was not full and perfect, for further remedy, gives them (*b*) "power to grant and assign all debts due, or to be due to "and for the benefit of the bankrupt, and the same to be re-"covered in the name of the assignees."

(*b*) Sect. 12.

Now I take the intention of these laws to have been, that the bankrupt having been guilty of a fraud, should not be trusted any more with the management of his estate; but that it should be put into other hands, for the safety of his creditors, and that the bankrupt should have no further intermeddling therewith.

Intention of the statutes against bankrupts.

So that upon this intention, all those effects, and debts,

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(1) Vide *Bosvill* v. *Brander*, post. 458. *Saddington* v. *Kinsman*, 1 Bro. C. C. 44.

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which he could take in, or turn into money, the assignees were designed to have, in as full a manner, either by action, or otherwise, and that in their own name.

The rule of common law to guide in construction of statutes.

The best rule of construing acts of parliament is by the common law, and by the course which that observed in like cases of its own before the act.

Thus it is upon the statute *de donis*, which enacts, that tenant in tail *non habeat potestatem alienandi tenementa*, to prevent their coming to the issue; and that a fine levied by him, *ipso jure sit nullus*. Now,

The effect of this statute being a disability to alien to the prejudice of others, therefore the law ranks the person incapacitated thereby, with bishops and other ecclesiastical persons, and with husbands, who were by the common law disabled to alien to the prejudice of their successors and wives.

And therefore, tho' the words be, that tenant in tail shall not have power to alien, and that his fine shall be void, yet it has been construed, that a fine by tenant in tail, is not *merely void*, but makes a discontinuance, thereby putting the issue to his *formedon*; and that other alienations, either put the issue to his action, or allow of his entry, just as the law stood before, in relation to bishops, &c.

At common law, it is a general rule, that no body can have an action but the creditor, or if he be dead, his representative; but there are two cases wherein this rule fails, (*viz.*) in the case of a forfeiture, and of an assignment to the king; for tho' a *chose in action* cannot be assigned to a common person, yet it may to the king; and in both these cases, the king, or his grantee * or assignee, may sue for those debts in their own name. 21 H. 7. 19. Though, generally, the grantee sued in the king's name; but that was only in order to take advantage of the prerogative.

Chose in action may be assigned to the king, and he, or his grantee, may have an action for it in their own name. (1)

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Now let us see how far the wife's debts were liable in these cases:

In the case of forfeiture, as by outlawry, &c. the debts of the wife were always extended and seised.

Debts due to the wife, dum sola, forfeited, and assignable to the king by the husband. (*z*)

In the case of assignment of debts to the king, Hob. 254.

(1) Vide *Earl of Stafford* v. *Buckley*, 2 Vez. 181.

(*z*) *Regina* v. *Thornton*, Parker 271.

is an authority in point, and that notwithstanding the 7 Jac. 1. cap. 15. which makes assignments of debts void, other than such as grew due originally to the king's debtor *bonâ fide;* for the purpose of that law was, that no debtor of the king should procure another man's debt to be assigned, which was the common practice; but this, says the book, is his own debt, tho' not to his own use, which he may himself release and discharge; and by the same reason, may assign.

This proves two things:

1*st*, That the husband might assign these debts by the common law.

2*dly*, That he was not restrained from doing it by the statute, because they were the husband's own debts.

This reason concludes the case at bar.

1*st*, As it is the husband's own debt within the words of the act.

2*dly*, That as the husband might assign it, *ergo*, so may the commissioners. [254]

Besides, it is to no manner of purpose; and can serve no good end at all, to say, that such debts are not assignable; for if they should be left in the husband, as soon as ever he recovers them, the commissioners must have the money, and apply it to the use of the creditors.

But in order to confine the sense of the words "debts due "and owing to him", it has been

Objected, 1*st*, That the statute does not extend to debts due to a bankrupt as executor.

Resp. This is true; but it is for this particular reason, because they are appropriated to pay the debts of the testator, and if they were assigned, it would be a wrong, (*viz.*) a *devastavit*.

2*dly*, It has been objected, that the statute does not extend to debts due to the bankrupt jointly with another.

Resp. The case cited for that purpose from 1 Lev. 17. is not determined; such debt might be assigned to the king, by any one of the creditors; and so it is adjudged Mich. 19 H. 6. 47. and it would be forfeited by the outlawry of one.

However, that case is not before us: thus far is plain, that a debt due from him and another, would be within this act of 4 Annæ; for it is so declared by the declaratory act of (*a*) 10 Annæ, which provides, at the same time, that the discharge of the bankrupt shall not extend to discharge the other joint debtor. [255]

(*a*) Cap. 15. sect. 3.

MILES *v.* WILLIAMS.

But this of a husband and wife is a different case; for it is his debt, as he is one with her,

But it is contended, that the bankruptcy ought not to give the husband a better right in his wife's debt, and bar her of her contingency of survivorship. (*z*)

Resp. It does not give him a better right; for his release for a consideration to himself alone would have barred her of the contingency; and this is a release in law, and amounts to the same thing.

Besides, this is answered by the fiction of law, whereby the statute of 1 Jac. cap. 15. and this statute have made it as a debt, and a new security to the assignees. Suppose a bond were made to *A.* in trust for *B.* who becomes a bankrupt, the assignees may bring the action in their own name, tho' *B.* must have brought it in the name of his trustees. (1)

Objected, The husband must join with the wife in this action, but the assignees cannot do it.

Resp. This is answered (as before), and by the cases of forfeiture, and assignment to the king. But to put another case:

Suppose a bill of exchange be made to the wife, *dum sola;* the husband may assign it, and the assignee shall bring the action in his own name.

Debts due from the wife considered.

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This reasoning holds stronger in the case of debts due from the wife; for,

1*st,* Certainly it is the husband's debt, and the action must be brought in the *debet* and *detinet*; it is admitted to be the husband's debt, after judgment, and it were hard to say; that a judgment of law charges a man with a debt, who was not chargeable with it, when that judgment was given against him.

2*dly,* If the intent of the act be considered, and the question asked *cui bono?* it will appear still stronger.

The persons concerned in this matter are,

1*st.* The bankrupt.

2*dly,* The creditors.

3*dly,* The wife.

As to the bankrupt; if an action be brought against him on such bond, what execution can the plaintiff have? if he takes a *fi' fa'* or *elegit,* as soon as he finds goods or lands, the com-

(1) *Contra, Ex parte Coysegame,* 1 Atk. 193.

(*z*) See *Jacobson* v. *Williams,* post. 382, *Mitford* v. *Mitford,* 9 Ves. 87.

missioners ought to seize them; this would be wholly ineffectual; and if he takes a *capias*, it will only serve to lay the bankrupt up in prison, when all his estate, wherewith he should make satisfaction and deliver himself, is taken out of his power; and that is the reason of his being discharged, (*viz.*) because his ability to pay is entirely taken from him.

And this distinguishes it from the case of an executor, and shews that *he* ought not to be discharged as to the testator's debts, for he retains his ability to pay them, by keeping the effects which he has as executor, and the commissioners cannot meddle with them, because they are appropriated. (*z*)

It was insisted at the bar, that he ought to be discharged [257] from all his debts, because he is obliged to part with all his estate liable to pay those debts; but this takes it up much too short; for he is not only obliged to deliver up all his estate *liable* to pay debts, but all whatsoever wherewith he *might* pay his debts; as for the purpose, copyhold lands, which are liable to no execution.

2*dly*, As to the creditor.

It cannot be for his benefit, that this debt should not be within the act; for the bankrupt's whole estate will be otherwise disposed of; and his action against the bankrupt can be worth nothing; but if this debt be within the act, then may he come in for his dividend.

The consequence of the contrary opinion is, that you take from him every thing wherewith his debt may be paid, and at the same time will not let him in for a share.

3*dly*, As to the wife.

It will be a discharge to her, at least a temporary one, (*viz.*) during the husband's life; but tho' it be not necessary to give any opinion upon that, yet I think it will amount to a perfect release, and the wife will be discharged for ever.

Wife is for ever discharged by the discharge of the bankrupt husband.

But no harm can arise from this; for the creditor is supposed to have had his dividend, and the debt is paid, in consideration of law.

A case may possibly be put, where a woman being in debt, [258] may make over all her effects in trust, and then marry a bankrupt, and by that discharge all her debts, and yet preserve her estate; but that would be a fraudulent conveyance, as against creditors, *quoad* so much of the estate as would satisfy their debts, and for that they might have remedy.

(*z*) See *Ex parte Ellis*, 1 Atk. 101.

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It was objected, that this discharge is a personal privilege, and not communicable to the wife.

Husband possessed of a term for years in jure uxor', it may be sold on a fi' fa'. (z)

Resp. It is a necessary consequence, that it must extend to her; because every thing in the husband's power is assignable, and all her estate is in his power; if the husband be possessed of a term for years in right of his wife, it may be sold on a *fi' fa'*, and yet it is not (*a*) actually transferred to the husband by the intermarriage.

(*a*) 1 Inst. 46. b. 299, 300.

For these reasons we are all of opinion, that this is the husband's debt within the meaning of the statute.

Second question. Plea ought to conclude to the country.

As to the second question, (*viz.*) whether the plea be good or not; (*y*)

We are likewise all of opinion, that it is ill not to conclude to the country.

A liberty of pleading *generally* is given to the bankrupt, and so he may avoid the hazard of pleading *specially*; but then he must take upon him the proof of his conformity to the statute, in every particular; or if he thinks fit to plead the matter specially, then he must set forth every point; and by it he has this advantage against the plaintiff that *he* must reply one particular only, upon which isssue must be taken.

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Here the defendant has pleaded the matter specially, but not set forth the whole, and therefore it is ill for that reason; for by the express words of the act, this is to be pleaded so, as that the whole merits may be tried.

Cases at common law, where a man must conclude to the country without an affirmative and negative.

There are several cases at common law, where a man shall conclude his plea to the country, tho' there be no affirmative and negative, to prevent the inconvenience that would arise by going on to a replication; as in 33 H. 6. 24. to a fine *quod partes finis nihil habuerunt; et de hoc ponit se super patriam.*

So, in a counterplea of a voucher, that he was never seised of such estate whereof he could infeoff him; *et hoc petit, &c.*

So in dower *nunqu' seisie de dower*; *et de hoc, &c.*

And the reason of this is, for that it would be inconvenient to go on to a replication; because to reply generally, would leave it too large and comprehensive; and to reply any particular kind of estate, would be too narrow, and consequently immaterial.

(*z*) And a husband may dispose of a term which his wife takes as administratrix, *Thrustout* v. *Coppin*, 2 Bla. 801. 3 Wils. 277. S. C.

(*y*) See *Tower* v. *Cameron*, 6 East, 413.

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This statute has formed a new general issue.

This statute has formed a new general issue in this case; and this was the foundation of the judgment in *Bird* and *Lacy*'s case, Mich. 6 Annæ, C. B. Rot. 321. that a plea upon this act was well concluded to the country; and if so, it cannot conclude to the court.

It may be observed on the statute of sewers, (23 H. 8. cap. 5.) that by the words of that act, a general replication is expressly given, to avoid the forcing the plaintiff to a single point; and so the mischief, which would be in this case, is prevented. Thus it must have been in this act, if it had not been the intention of it to make the plea a general issue.

For this fault in the plea, which is shewn for cause of demurrer, and which would put a difficulty on the plaintiff, not intended by the statute, judgment must be given for the plaintiff.

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Ex parte MACKERNESS. ON PETITION.

CASE 58.

At LORD CHANCELLOR'S.

A single creditor, to whom 103*l.* was due from *A.* by two notes, and 53*l.* part thereof not yet payable, before the 5th of Geo. 2. sues out a commission of bankruptcy; such commission set aside as irregular. †

J. S. a weaver, sold to *Mackerness*, a mercer, some silk for 103*l.* and at the same time took two notes from *Mackerness* for payment thereof, (*scil.*) one note for 50*l.* payable at a day since past, and another note for 53*l.* at a day yet to come.

And before the last day of payment incurred, *J. S.* took out a commission of bankruptcy against *Mackerness*, who was really a bankrupt, but petitioned to set this commission aside as irregularly taken out, it being taken out at the single petition of *J. S.* to whom (*a*) only 50*l.* and not 103*l.* was *then* due; and the statute 5 Annæ, cap. 22. requires, that if a single creditor sues out a commission, a debt of 100*l.* must be due

(*a*) Vide post. ex parte James, 610.

† See the statute of 7 *Geo.* 1. *cap.* 31. whereby such creditors by note or bond, payable at a future day, are admitted to prove their notes, *&c.* and are entitled to a proportionable part of the bankrupt's estate; tho' they must not join in suing forth the commission till such their debts become payable. However, by the 5th of his present majesty, persons having bills, bonds, or notes, payable at a future day, may join in petitioning for commissions. (*z*)

(*z*) See St. 6 Geo. 4. c. 16. s. 15.

EX PARTE MACKERNESS.

to him; if two creditors sue it out, there must be 150*l.* due to them; if three or more, there must be 200*l.* or more due to them.

Whereupon Lord Chancellor superseded the commission, saying, that in a late case the Lord C. J. *Parker* was of the same opinion; and that Lord *Trevor*, discoursing with the Lord C. J. *Parker* and himself in the House of Lords, seemed to concur in such opinion likewise; but the court denied to assign the bond, the commission not appearing to be taken out *maliciously* or *fraudulently*, which are the (*a*) words of the act.

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(*a*) Sect. 7.

CASE 59.

TUCKER *versus* WILSON.

LORD CHANCELLOR HARCOURT.

15 Vin. Ab. 476. pl. 7.
2 Eq. Ca. Ab. 597. pl. 14. 608. pl. 3.
1 Bro. P. C. 494.

Exchequer annuities mortgaged may be sold upon notice, without a foreclosure. (1)

ONE possessed of an exchequer annuity for ninety-nine years, borrowed money upon it; and for securing this money there was an absolute transfer of the annuity, but with a defeasance, that if the money were paid at such a day, the assignment should be void.

The money was not paid at the day; upon which the lender frequently desired the money, and gave notice that he would sell, and appointing a time for that purpose desired the borrower to be present to see that the annuity was sold at the full value.

4. Ves. & Cr. 181.
18. Q. B. D. 227.

The borrower, by letter, desired that the lender would stay a week longer before he sold, which was also complied with; and then the lender dying suddenly, (2) the defendant, his administrator, sold the annuity at the exchange, by a sworn broker, for the full value that those annuities then sold for, and which was less than what the money due to the defendant amounted unto.

These annuities afterwards rose in value; whereupon the mortgagor, brought a bill to redeem, or to compel the defendant to purchase another annuity on the same fund, and

(1) So *Lockwood* v. *Ewer*, 2 Atk. 303. on a mortgage of East India stock. (*z*)

(2) *Wilson* was the lender, and *Tucker* the administrator of *Thynne* the borrower.

(*z*) And see *Kemp* v. *Westbrook*, 1 Vez. 278.

TUCKER v. WILSON.

of the same yearly value, to be transferred to the mortgagor, on his payment of principal and interest.

Lord Chancellor: Here is no express power to sell; and annuities for ninety-nine years are like rent-charges out of lands, and not like stocks, which may be thought to be of imaginary value; and there being no decree for foreclosing the mortgagor, nor any agreement in writing, that the mortgagee should sell; let the defendant procure an annuity of the like value, and upon the same fund, to be conveyed to the plaintiff upon his payment of the principal and interest to the defendant; and let the master compute what is due for principal and interest.

1910. 1. Ch. 636.

From which decree an appeal was brought in the House of Peers, where it was insisted, that these exchequer annuities, as well as stocks, were usually sold at the exchange, and that this was but as a pawn; and though there was no express power to sell in the defeasance, yet by the mortgagor's letter, it was plainly submitted to, when the mortgagor desired the sale might be deferred for a week; that the convenience of these securities, among merchants, was, that after the day of payment past, they were taken to be ready money; and that it would be infinitely troublesome, and dilatory, if there could be no sale of such annuities thus pledged, without a decree of foreclosure; that this would set aside several sales that had been made in the like cases, and occasion multiplicity of suits; that the case here was the stronger, it being that of an administrator, who was obliged to dispose of the assets of the intestate to pay his debts and legacies.

Wherefore the decree was reversed by the Lords *nemine contradicente.* (1)

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(1) 1 Bro. P. C. 494.

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DONE'S CASE.

CASE 60.

LORD CHANCELLOR HARCOURT.

Salk. 702.

A ne exeat regnum lies to prevent one's going to Scotland, and also for a defendant in an account against a co-defendant.

ON an application made to the court for a *Ne exeat regnum,* to stop the defendant from going to *Scotland,* it was objected, that since the union, *Scotland* was part of this kingdom, and consequently, that going to *Scotland* could not be construed *going out of the kingdom,* nor any breach of the condition of the security given on such writ.

DONE'S CASE. *Lord Chancellor: Scotland* being out of the jurisdiction of this court, and consequently out of the reach of the process thereof, the defendant's going into *Scotland* is equally mischievous to the suitor here, as if he went actually out of the kingdom; wherefore take a *Ne exeat regnum* (1); and tho', in

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(1) With respect to this writ it has been determined, 1st, that it cannot be granted except *on bill filed*, Ex parte *Brunker*, post. Vol. III. 312. (*z*)—2dly, That it shall not issue on a *mere legal* demand, for which the defendant might have been holden to bail, Ex parte *Brunker*, ub. sup. *Anon.* 2 Atk. 210. (*y*) *Pearne* v. *Lisle*, Amb. 76. *Atkinson* v. *Leonard*, 3 Bro. C. C. 218. (*x*) but from the last mentioned case it seems, that it *shall* issue in matters where the courts of law and equity have *concurrent* jurisdiction. (*w*) It may also issue at the instance of a wife, who is suing for alimony in the *spiritual* court, because that court cannot hold to bail, *Smithson*'s case, 2 Vent. 345. *Read* v. *Read*, 1 C. C. 115. *Anon.* 2 Atk. 210. *Pearne* v. *Lisle*, ub. sup. (*v*) 3dly, The demand must be certain in its nature, *Anon*, 1 Atk. 521. *Anon.* 1 Bro. C. C. 376. (*u*) 4thly, That in general the application must be supported by an affidavit, swearing positively to the debt, *Rico* v. *Gualtier*, 3 Atk. 501. *Anon.* 2 Vez. 489. (*t*) but on bill for an account, it is sufficient for the plaintiff to swear to the balance *as to his belief*, *Rico* v. *Gualtier*, ub. sup. (*s*) Where the demand is against an administrator, &c. the plaintiff should also swear to his belief of assets come to the defendant's hands, *Anon.* 2 Vez. 489. 5thly, This writ may issue against a feme coverte executrix, whose husband is out of the jurisdiction, *Jerningham* v. *Glass*, 3 Atk. 409. and Amb. 62. (*r*)

(*z*) And see *Roddam* v. *Hetherington*, 5 Ves. 95.

(*y*) S. C. 1 Dick. 82. nom. *King* v. *Smith*.

(*x*) *Brocker* v. *Hamilton*, 1 Dick. 154. *Ex parte Duncombe*, 2 Dick. 503. Nor for a *legal* demand against an attorney, though privileged from arrest, *Gardner* v. ———, 15 Ves. 444. And see *Crosley* v. *Marriot*, 2 Dick. 609.

(*w*) And see *Jones* v. *Sampson*, 8 Ves. 593. *Jones* v. *Alephsin*, 16 Ves. 470. *Howden* v. *Rogers*, 1 V. & B. 129.

(*v*) *Ex parte Whitmore*, 1 Dick. 143. *Haffey* v. *Haffey*, 14 Ves. 261. And see *Coglar* v. *Coglar*, 1 Ves. jun. 94. *Evans* v. *Evans*, ib. 96. *Percy* v. *Powell*, Beames, *Ne. ex.* 25. *Shaftoe* v. *Shaftoe*, 7 Ves. 171. *Dawson* v. *Dawson*, ib. 173. *Oldham* v. *Oldham*, ib. 410.

(*u*) *Cock* v. *Ravie*, 6 Ves. 283. *Haffey* v. *Haffey*, 14 Ves. 261.

(*t*) *Jackson* v. *Petrie*, 10 Ves. 164. The affidavit may be sworn before a master in chancery in Ireland, *Johnson* v. *Smith*, 2 Dick. 592. An affidavit of information and belief of the defendant's intention to go abroad without stating the grounds of belief, is not sufficient, *Oldham* v. *Oldham*, 7 Ves. 410. *Etches* v. *Lance*, ib. 417. *Amsinck* v. *Barclay*, 8 Ves. 597. *Hannay* v. *M'Entire*, 11 Ves. 54. but it need only state that the debt will be endangered by the defendant's going abroad, without averring an intent to avoid the jurisdiction, *Tomlinson* v. *Harrison*, 8 Ves. 32. *Stewart* v. *Graham*, 19 Ves. 313. An admission of the debt in the answer, or the master's report of a sum due is sufficient, *Roddam* v. *Hetherington*, 5 Ves. 95. *Collinson* v. ——, 18 Ves. 353.

(*s*) *Jackson* v. *Petrie*, 10 Ves. 164. *Amsinck* v. *Barclay*, 8 Ves. 597.

(*r*) 1 Dick. 107. 1 Tur. 97. Sed vide contrà, *Pannell* v. *Tayler*, 1 Tur. 96.

this case, the party moving for the writ be also a defendant, yet, forasmuch as it is a matter of account, in which † both parties are actors, and money being sworn due from the party, against whom the writ is prayed, to the other, the motion is proper. DONE'S CASE.

Note, Where the party is to be restrained from going to *Scotland*, the condition must be, not to go out of the realm, *or to Scotland;* for if it be only, not to go out of the realm, the parties going to *Scotland* will not (1) forfeit the bond or recognizance. How the condition of the recognizance in such case must be worded.

† Vide Pre. Cha. 197. For which reason also, after a decree to account, and abatement of the suit by the defendant's death, his representative may revive. *Anon.* 3 Atk. 691.

S. C. and *Moor* v. *Mellish* (*z*) therein cited. 6thly, But as the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the suit, the court always inclines to discharge the writ upon such security being given. *Baker* v. *Dumaresque*, 2 Atk. 66. *Jerningham* v. *Glass*, ub. sup. *Robertson* v. *Wilkie*, Amb. 177. (*y*) *Atkinson* v. *Leonard*, ub. sup. (*x*) Whether the writ shall issue against a foreigner or person usually resident *out* of the jurisdiction, in respect of a demand, which originated *abroad*, and is *there* sueable, vide *Pearne* v. *Lisle*, *Robertson* v. *Wilkie*, and *Atkinson* v. *Leonard*, ub. sup. (*w*)

(1) Sed vide *Hunter* v. *Maccray*, Ca. temp. Talb. 196. (*v*)

(*z*) 1 Dick. 30. S. C.

(*y*) 2 Dick. 786. S. C.

(*x*) *Roddam* v. *Hetherington*, 5 Ves. 95. *Dick* v. *Swinton*, 1 V. & B. 371.

(*w*) *De Carriere* v. *De Calonne*, 4 Ves. 584. It is now settled that those circumstances are not of themselves a ground for refusing the writ, *Jackson* v. *Petrie*, 10 Ves. 164. *Stewart* v. *Graham*, 19 Ves. 313. *Howden* v. *Rogers*, 1 V. & B. 129. The plaintiff's title must be complete, *Ray* v. *Fenwick*, 3 Bro. C. C. 25. *Swift* v. *Swift*, 1 Ba. & Be. 326. The bill need not pray the writ, *Collinson* v. ——, 18 Ves. 353. The writ shall not issue against a member of parliament going to Ireland or Scotland during time of privilege, *Bernal* v. *Donegal*, 11 Ves. 43. Nor against a purchaser for his purchase money, before it has been shewn that plaintiff is entitled to a specific performance, *Goodwin* v. *Clarke*, 2 Dick. 497. *Raynes* v. *Wyse*, 2 Mer. 472. *Blaydes* v. *Calvert*, 2 J. & W. 211. Nor for costs, *Goodman* v. *Sayers*, 5 Mad. 471. But see *Stewart* v. *Stewart*, 1 Ba. & Be. 73. It shall be discharged where defendant has been held to bail, though the action have been afterwards discontinued, *Amsinck* v. *Barclay*, 8 Ves. 597. *Raynes* v. *Wyse*, ub. sup. So, on payment into court of the sum for which it was marked, *Baker* v. *Jeffries*, 2 Cox. 226. *Dick* v. *Swinton*, 1 V. & B. 371. If defendant goes abroad after giving surety not to quit the kingdom, his sureties must pay into court the sum for which the writ was marked, *Musgrave* v. *Medex*, 1 Mer. 49. *Utten* v. *Utten*, ib. 51.

(*v*) *Wilson* v. *Boswell*, 2 Dick. 535.

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DE TERM. S. MICHAELIS, 1714.

CASE 61.

TATE *versus* AUSTIN.

LORD CHANCELLOR COWPER.

1 Eq. Ca. Ab. 62. pl. 5.
2 Vern. 689.
Husband borrows money, husband and wife levy a fine of the wife's land as a mortgage for it, and husband by will gives legacies to charities to the amount of his personal estate, and dies; the mortgage shall be paid out of his personal assets, tho' the charitable legacies will be thereby lost; but all the husband's debts, tho' by simple contract, shall be preferred to the mortgage.

HUSBAND seised in right of his wife, borrows 500*l.* in order to supply his occasions, particularly to buy himself a commission in the army; and for the securing of this money, he and his wife levy a fine of the wife's inheritance, and raise a term of 500 years, which is limited to the person lending the 500*l.* to be void upon the payment of the 500*l.* and interest, with remainder to the use of the wife in fee; and in the deed the husband covenants to pay the mortgage-money.

Afterwards the husband makes his will, by which he gives several charities out of his personal estate, and dies indebted by simple contract.

The widow brings her bill to have this mortgage, made of her inheritance, discharged out of her husband's personal estate. On the other hand,

[265] The assets were not sufficient to pay the mortgage-money, and also the charities given by the will.

Lord Chancellor: This mortgage is a debt of the husband, which must be paid before legacies; and the wife, by consenting to charge her land with it, does not make it less his debt than it was before; the personal estate shall be liable to pay debts, before legacies, tho' to a † charity, for they are still but legacies; but all other debts of the husband shall be preferred to this (2); every thing shall be taken favourably

† Vide post. *Masters* v. *Masters*, 422. and *Attorney General* v. *Hudson*, 675. Legacies to a charity, on a deficiency of assets, are to abate in proportion, as well as other pecuniary legacies. (1)

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(1) So *Attorney General* v. *Robins*, post. Vol. II. 25.

(2) Yet it is said in the report of *Robinson* v. *Gee*, 1 Vez. 252. that if the mortgagee had received satisfaction out of the personal estate of the husband, the creditors of the husband would not stand in the place of the mortgagee as against the real estate of the wife.

for the wife, who, for the supplying the husband's occasions, has agreed to charge her land with a debt of his. The fine and deed of uses, by which the mortgage is created, are but as one conveyance; so that these legacies, (tho' for a charity) are to be left unpaid, since it appears there are not assets of the husband to pay both the mortgage and the legacies. (1)

On this occasion Lord Chancellor put the counsel in mind of Lord (*a*) *Huntingdon*'s case, where husband seised in fee, in right of his wife, did with his wife by deed and fine mortgage her estate for 500 years, remainder to the use of the wife in fee. The mortgage was to raise a sum of money for the use of the husband to buy him a place, which accordingly he did buy, and thereby got money, and paid off the mortgage, taking an assignment of it in trust for himself, his executors and administrators; afterwards the husband and wife died, and the heir of the wife brought his bill to exonerate the inheritance, and to have this mortgage paid off out of the husband's personal estate;

(*a*) 2 Vern. 437.

And tho' it was decreed by Lord Keeper *Wright*, that the heir of the wife was not intitled to have the personal estate of the husband so applied; yet upon an appeal to the House of Lords, that decree was reversed, and the mortgage decreed to to be paid out of the husband's personal assets (2); which Lord *Cowper* thought very just. *Quod nota*; it being insisted upon

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(1) Reg. Lib. B. 1714. fo. 114. Decree for a general account of the testator's personal estate. "His lordship declaring that the specific legacy of 600*l.* to the defendant *John Austin*, cannot take place of the said testator's debts; and as to the question whether the mortgage made to *Elizabeth Fitzhugh*, be such a debt of the said testator as ought to be paid out of his personal estate, his lordship was satisfied that the said 400*l.* for which the said *Susan* his wife so pledged her lands, was borrowed for, and came to her husband's own use, and did conceive that what was done by him after the fine levied, was part of the agreement between them for levying the fine and making the mortgage. And her husband having, in the deed of mortgage, covenanted to pay the mortgage money and interest, the same ought to be taken as part of that agreement, and that thereby he undertook to discharge his wife's estate, and that therefore her estate ought to be discharged by her husband's assets, but that the said specific legacy of 600*l.* ought to be liable to pay his other debts, in the first place, in case there is not other personal estate sufficient, and afterwards to make the plaintiffs (*i. e.* the widow and her second husband,) satisfaction so far as they shall not be otherwise satisfied by other assets of the said testator, and doth order and decree the same accordingly, and that after the other debts and the plaintiff's demands satisfied, the specific legacy do take place."

(2) 1 Bro. P. C. 1.

TATE v. AUSTIN. that it was a *gift* of so much money from the wife to the husband, and therefore not to be refunded. (1)

(1) Et vide *Pocock* v. *Lee*, 2 Ver. 604. *Bagot* v. *Oughton*, post. 347. *Evelyn* v. *Evelyn*, post. Vol. II. 659. *Lewis* v. *Nangle*, Amb. 150. and post. Vol. II. 664. (note.) (*z*) S. C. Earl of *Kinnoul* v. *Money*, (cited) 3 Bro. C. C. 206. (*y*) *Clinton* v. *Hooper*, ib. 201. *Parteriche* v. *Powlet*, 2 Atk. 384. *Lacam* v. *Mertins*, 1 Vez. 313. (*x*)

(*z*) 1 Cox. 240.
(*y*) 3 Swan. 202.
(*x*) *Innes* v. *Jackson*, 16 Ves. 356. 1 Bligh 104. *Ruscombe* v. *Hare*, 6 Dow. 1.

CASE 62. SIR CÆSAR CHILD AND OTHERS, ASSIGNEES OF A COMMISSION OF BANKRUPTCY TAKEN OUT AGAINST SIR STEPHEN EVANS; } Plaintiffs.
THOMAS FREDERICK, ESQ; Defendant.

First bill to be answered before the cross-bill. (*z*) *A.* brings his bill against *B.* and *C.* who put in insufficient answers, and prefer their cross-bill against *A.* *B.* becomes a bankrupt; his assignees bring their bill in nature of a bill of revivor against *A.*: they shall not go on till *C.* has answered *A.*'s bill.

MR. *Frederick* brought his original bill against Sir *Stephen Evans* and *Hayter*, as partners, for an account; and Sir *Stephen Evans* and *Hayter* brought their cross-bill against Mr. *Frederick*, but *Frederick*'s bill (after many disputes) being settled to be prior, it was ordered that that should be first answered; upon which, Sir *Stephen Evans* and *Hayter* put in an anwser, which was reported insufficient; then Sir *Stephen Evans* becomes a bankrupt, and his estate is assigned by the commissioners to Sir *Cæsar Child* and others, who bring their bill in nature of an original bill against Mr. *Frederick* for this account; and Mr. *Frederick* pleading the statute of limitations, his plea was allowed.

*Afterwards Sir *Cæsar Child* and others, the assignees, bring their bill in nature of a bill of revivor, grounding it upon the former bill brought by Sir *Stephen Evans*.

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And it was now moved by Mr. *Frederick*, and so ordered by the Lord Chancellor, that *Hayter*, who was a co-plaintiff with Sir *Stephen* in the former bill, should answer Mr. *Frederick*'s bill, before Mr. *Frederick* should answer Sir *Cæsar*'s bill; in

(*z*) *Harris* v. *Harris*, 1 Tur. 165.

regard Sir *Cæsar*'s bill, had it not been in the nature of a bill of revivor of Sir *Stephen*'s original bill, would have been barred by the statute; and then, if Sir *Cæsar* stood in the place of Sir *Stephen Evans* and *Hayter*, he could not be in a better condition; consequently, since, if Sir *Stephen* had been alive and continued plaintiff, *Hayter*, as well as he, must have first answered Mr. *Frederick*'s bill, so must *Hayter* (1) do now; and as one way, (*viz.*) (to get out of the statute of limitations,) Sir *Cæsar* had the *benefit* of coming into Sir *Stephen*'s place, so must he submit to have the *disadvantage* of it the other way.

(1) Vide *Stewart* v. *Roe*, post. Vol. II. 435.

ANONYMOUS.

CASE 63.

ONE devises all his goods; and whether a debt by bond passed to the devisee, was the question.

Devise of all one's goods passes a bond. (2)

Decreed by Lord Chancellor *Cowper*, that it did; that these words seemed at common law to pass a bond, and to extend to all the personal estate; but this being in the case of a will, and a will relating to a personal estate too, it ought to be construed according to the rules of the (*a*) civil law.

Civil law divides all manner of estates into bona mobilia and bona immobilia.

*Now the civil law makes *bona mobilia*, and *bona immobilia*, the *membra dividentia* of all estates; *bona immobilia* are land, *bona mobilia* are all moveables, which must extend to bonds; and therefore by the devise of all the testator's goods, a bond must pass.

(*a*) Ante 12. et post. Plume v. Beale, 389.

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(2) Vide *Ryall* v. *Rolle*, 1 Atk. 171. 177. 180. 182. 1 Vez. 362. 366. 369. 371. S. C. But bonds (as a species of choses in action) admit of no locality, and therefore a devise of goods and chattels *in a particular place* will not pass bonds which happen to be in that place at the death of the testator. *Chapman* v. *Hart*, 1 Vez. 273. *Moore* v. *Moore*, 1 Bro. C. C. 127. (*z*)

(*z*) *Jones* v. *Sefton*, 4 Ves. 166. And see *Porter* v. *Tournay*, 3 Ves. 311. *Nisbett* v. *Murray*, 5 Ves. 149. *Rawlings* v. *Jennings*, 13 Ves. 39. *Randall* v. *Russell*, 3 Mer. 190. *Cole* v. *Fitzgerald*, 1 Si. & Stu. 189.

H. Beq. 201

CASE 64.

FLOYER *versus* LAVINGTON.

2 Eq. Ca. Ab. 596. pl. 12, One for 800*l.* consideration grants a rent-charge of 48*l.* a year in fee, upon condition that if the grantor during his life shall give notice, and pay in the 800*l.* by instalments, viz. 100*l.* at the end of every six months, and shall do this during his own life time, the grant to be void: the mortgage was made about sixty years since, when the legal interest of money was 8 per cent. Decreed not redeemable.

ONE grants a rent-charge in fee of 48*l. per annum*, upon condition, that if the grantor shall at any time give notice of his intention to pay in the consideration money (being 800*l.*) by instalments (*viz.*) 100*l.* at the end of every six months, and shall, pursuant to such notice, pay the said money and interest, *at any time during his life-time*, then the grant to be void; but there is no covenant in the deed from the grantor of the rent-charge to pay the money, and the rent-charge was much less than what the interest of the money came to, (for the interest was at that time 8 *per cent.* the conveyance being made above sixty years since,) and the grantee of the rent-charge had conveyed it over, after the † grantor's death, to a purchaser, to whom he had given a collateral security for quiet enjoyment, and the purchaser had afterwards made a marriage settlement of it.

And now, upon a bill brought by the heir of the grantor, to redeem this rent-charge, the only question was whether it was redeemable?

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In case of a mortgage, no clause can confine the equity of redemption to the life-time of the mortgagor, or to him and the heirs male, or heirs only of his body.

Sir *Joseph Jekyll* for the plaintiff. The clause restraining the redemption to the life of the mortgagor is of no force; for an estate once redeemable cannot be rendered irredeemable by any words or agreement made at the same time; for as the borrower is commonly neccessitous, this would put it in the power of the scrivener to make advantage of such necessities, and would let in oppression, and foreclose the power and jurisdiction of this court.

In *Newcomb* (1) v. *Bonham*, the clause was, that if the mortgagor, at any time, during his life, should pay the money, the mortgage should be void; and in that case there was no covenant to pay any interest or principal, and the circumstances there, were much stronger than in the present case, the conveyance being to a *sister*, and frequent declarations made by the mortgagor, that his niece, who was his brother's daughter, and had brought the bill to redeem, should not inherit the estate.

However, it was in that case admitted by counsel on both sides, and decreed, that a power of redemption could not be

† *Quære*, when the mortgagor died?

(1) 1 Vern. 7. But this decree was afterwards reversed, 1 Vern. 214. 232.

barred by any clause or agreement made at the same time with the mortgage.

So in 2 Cha. Ca. 147. (*a*) *Howard* v. *Harris*, an equity of redemption was limited to the grantor and the heirs *male of his body*; yet it was decreed, that the *heir general* of the grantor should redeem; and it is there particularly laid down as a rule, that where the conveyance is but a mortgage, no words or clause shall prevail to bar the grantor, *his heirs or assigns* from redeeming; otherwise the act of a scrivener would be too hard for the power and jurisdiction of the court of Chancery.

(*a*) 1 Vern. 33.

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Then as to the length of time, this case differed from the case of lands, were the profits and out-goings being uncertain, the allowing a stale redemption, would (probably) put a difficulty upon the mortgagee in his accounting: but in the case of a rent-charge, the revenue was certain, and the out-goings (if any) certain also.

Mortgage of a rent redeemable at a greater distance of time than a mortgage of lands.

But what he chiefly relied upon, was, that as the statute of limitations had, in the case of lands, after twenty years' possession, barred the plaintiff of his entry or ejectment, so the court of (*b*) equity, in imitation of that law, would not allow the mortgagor to redeem the mortgage, after the mortgagee had been twenty years in possession; and that the same length of time should bar a redemption in equity, as barred an entry at law.

(*b*) Vide 2 Vent. 340.

But that at law, in case of a rent charge, though that had not been paid, or demanded, for twenty years, yet such duty being created by deed (as all rent-charges must be) no part of the remedy was taken away; and he cited the case of Lord *Widdrington* v. *Jennings*, in Lord *Harcourt*'s time, where the court took such a difference betwixt a mortgage of a rent-charge, and of land; and in the former case, after a very long time, (I think eighty years) allowed of a redemption.

As to the objection, that here was no covenant for the payment of the principal or interest, he said, that was not material; the same not being necessary for the making of a mortgage, nor yet necessary, that the right should be mutual, (*viz.*) for the mortgagee to compel the payment, as well as for the mortgagor to compel a redemption; since such conveyance, as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage. (1)

Mortgage may be without covenant or bond for the mortgagor to redeem.

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(1) Vide 2 Atk. 496. and *Howel* v. *Price*, post. 291.

FLOYER *v.* LAVINGTON.

That when the grantee of the rent charge, did, after the death of the grantor, sell the rent-charge, and give a collateral security for the quiet enjoyment of it against the heirs of the first grantor, this manifested it to be the apprehension of the parties themselves, that it was a redeemable estate, and accepted as such, with a counter-security against it.

Mortgage, tho' never so old, is redeemable, if interest has been paid.

And, that though a mortgage were made never so many years since, yet if the mortgagor, and those claiming under him had continued to pay interest, the length of time was, in such case, no objection to the right of redemption. (1)

Now in this case, the rent-charge was the interest agreed on by the parties, and the payment of the rent-charge, the payment of interest; by which the objection of the length of time was wholly taken off. But,

Lord Chancellor Cowper conceived the rent-charge to be not redeemable, at so great a distance of time, and that this court had heretofore gone too far in permitting redemptions.

It was material, that at the time of making the mortgage, interest was at 8*l. per cent.* and therefore the rent-charge of
[272] 48*l.* a year, being so much less than the yearly interest of 800*l.* at 8 *per cent.* (which came to 64*l.* a year) the payment of the rent charge could not be taken to be the payment of the interest.

That here several circumstances concurred, which, though each of them, singly, might not be of force to bar the redemption, yet all of them, joined together, were strong enough to prevail over it.

That the mortgagee seemed to have allowed a consideration for the purchasing the equity of redemption after the death of the mortgagor:

1*st*, By taking the rent-charge at 48*l. per annum.*

2*dly*, By agreeing to take his principal money by *instalments.*

3*dly*, By leaving it at the election only of the mortgagor, whether he would redeem or not; and there could be no reason given, why such a contingent right of redemption might not, upon fair and reasonable terms, be purchased.

That the length of time, where so great, as in the present case, was a good bar of redemption of a rent-charge as well as

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(1) So, if the mortgagee has admitted himself to have no title, but under the mortgage. *Perry* v. *Marston*, 2 Bro. C. C. 397. (*z*)

(*z*) 2 Cox. 295. Coop. 165. S. C. cited. And see *Cook* v. *Arnham*, post. Vol. III. 287.

of land; that the alienation, purchase, and settlement of this rent-charge after the death of the mortgagor, being all without any fraud, were of weight; as likewise, that the mortgagor was not bound to pay the money by any covenant; that the purchase of this rent-charge did no ways, either create, or admit of a right of redemption, by taking the security against a redemption, that being only a prudent caution made use of by the purchaser, which the seller, being satisfied it would not hurt himself, might advise him to.

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Wherefore the court decreed, (1) that the bill for a redemption should be dismissed with the usual costs, it being only upon bill and answer. But it was thought that the length of time was the chief objection to the redemption. (2)

(1) Reg. Lib. A. 1714. fo. 111.

(2) Vide *Ord* v. *Smith*, 2 Eq. Ca. Ab. 600. pl. 27. *Jenner* v. *Tracey*, and *Belch* v. *Harvey*, post. Vol. III. 287. note [B.] (*z*) *Mellor* v. *Lees*, 2 Atk. 494. (*y*)

(*z*) App. to Sugd. Vend. 35.

(*y*) *Cholmondeley* v. *Clinton*, 2 Mer. 173. 357. 2 J. & W. 1. 138. S. C. in which the effect of length of time, as a bar to an equitable title, was elaborately considered.

DE TERM. S. HILLARII, 1714.

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1. Tu. 4 Keen. 13.

PERKINS *versus* MICKLETHWAITE.

CASE 65.

ONE *Micklethwaite*, who was the defendant's father, had two sons, *Thomas* and *Joseph*, and also two daughters, and

One devises portions to his children, *A. B.* and *C.* and if any die before twenty-one or marriage, the portion of the child so dying to go to the survivor: one of the children dies in the life-time of the testator; this is not a lapsed legacy, but shall go over to the surviving children. (3)

(3) So *Miller* v. *Warren*, 2 Vern. 207. *Ledsome* v. *Hickman*, ib. 611. and post. Vol. III. 114. note [A.] S. C. *Willing* v. *Baine*, post. Vol. III. 113. *Scoolding* v. *Green*, Pre. Cha. 37. *Hornsby* v. *Hornsby*, Mos. 319. (*z*)

(*z*) *Massey* v. *Hudson*, 2 Mer. 132.

PERKINS v. MICKLETHWAITE.

made his will, giving thereby 1500*l.* to his youngest son *Joseph*, and 1000*l.* to each of his two daughters, and directed, that if any of his three younger children should die before their age of twenty-one or marriage, then the portion of him, or her, so dying, should go over to the survivors, and gave his real estate to his eldest son chargeable with these portions.

One of the daughters died within age, and before marriage; *Joseph* the younger son died also within age, and before marriage, in the life-time of his father the testator.

[275] The father lived to have another son, whom he named *Joseph;* and afterwards wrote a codicil at the bottom of his will, by which he confirmed the will, thereby taking notice, that since the last, it had pleased God to give him another son, and gave a legacy of 500*l.* a-piece to his son *Joseph*, and his surviving daughter, over and above what he had given them by his said will.

Upon this cause's coming on first before Lord Chancellor *Harcourt*, touching the share of the deceased daughter's portion, *viz.* whether, upon the death of the son *Joseph*, the share of the said deceased daughter, that was vested in *Joseph*, should survive with *Joseph*'s portion?

His Lordship decreed it should not; (1) because the por-

(1) So *Rudge* v. *Barker*, Ca. temp. Talb. 124. *Pain* v. *Benson*, 3 Atk. 78. *Ex parte West*, (*z*) in the matter of *Scaife* a bankrupt, heard before Lord *Thurlow* in *Lincoln's Inn Hall*, *June* 10, 1784. The only question in the petition arose upon the following clause in a will: "I leave to *A. B.* and *C.* "sons of *Arthur Scaife*, 1000*l.* each, "the interest to be added to the prin- "cipal yearly, until they shall respec- "tively attain the age of 21 years, and "in case *one* of them shall die before "that age, then to the survivor." *A.* died and then *B.* died, both under 21 years. *Q.* Whether that part of the share of *A.* which survived to *B.* upon the death of *A.* survived afterwards to *C.* upon the death of *B?* or whether *B.*'s *original* share only survived. Ld. Chancellor,—"It is impossible for me "to determine this survived part to sur- "vive again, without contradicting Lord "Talbot's decision in *Rudge* v. *Barker*. "The question is, Whether the word "'share' in the cases cited, does not "mean all that the party took under "the will, which would take in the "survived part as well as the original "share, and which I should think a "very natural construction; but here "are cases in point expressly deter- "mined otherwise. I own it struck "me forcibly from the first, that the "whole ought to survive, but I cannot "find any difference between this and "the cases cited. As to the case of "*Paine* v. *Benson*, it seems to me that "Lord *Hardwicke* disapproved of the "general rule, which induced him to "endeavour to find a distinction. I "cannot agree with him in considering "that case as an exception to the gene- "ral rule, although perhaps I should

(*z*) 1 Bro. C. C. 575. S. C. *Walker* v. *Main*, 1 J. & W. 1.

tion of the deceased daughter became vested in *distinct shares* in the surviving children, and there were no words for creating a jointenancy of these shares. [*quære autem*, for a devise over to two or more, is a joint devise of course, unless there be words to sever the jointenancy.] But,

The other points, being reserved, were argued now before Lord Chancellor *Cowper;* and whereas it was objected, that by the death of *Joseph* in the life-time of the testator, his father, the 1500*l.* portion given to him became a lapsed legacy, and should sink into the estate:

Lord Chancellor said, it was improper to call this a lapsed legacy, but it was a portion given (*a*) over, and should take effect; that the making the codicil was a republication of the will, and did amount to * a substituting the second *Joseph* in the place of the first; as if the testator had made his will anew, and had writ it over again, by which new will the second *Joseph* must take; and that the fixed intention of the testator appeared to be, that *Joseph* should have more than his daughter; whereas, if the 1500*l.* legacy should be taken to be a lapsed legacy, then the surviving daughter should have twice as much as *Joseph*.

(*a*) Ante 96. Lord Bindon *v.* Lord Suffolk, and post. Northey *v.* Strange, 343.

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" in his opinion of the rule itself. How-
" ever it will be too much for me, sitting
" in bankruptcies, (when I can have
" no opportunity of reconsidering my
" opinion) to decide this against the
" authorities. If the parties chuse to
" bring this before me in a more solemn
" way, upon bill and answer, I will give
" it more consideration." In consequence of what fell from the Lord Chancellor a bill was filed, and the cause of *West* v. *Oliphant* came on to be heard before Sir *Lloyd Kenyon* at the Rolls, on the 2d *June*, 1785; when his Honor expressed his concurrence with the cited cases, and said that it would be too much to extend the words by conjecture beyond their natural import; and therefore declared, that the moiety of the legacy, which survived to *B.* on the death of *A.* vested absolutely in *B.* and did not, on his death under the age of 21, survive to *C.*

DE TERM. S. TRINITATIS, 1715.

CASE 66. FINCH *et al' versus* EARL OF WINCHELSEA.

One agrees for a valuable consideration to convey lands to *J. S.* and afterwards confesses a judgment to *J. N.* If the consideration-money paid by *J. S.* be any ways adequate to the value of the land, it binds the land in equity, and shall defeat the judgment. (*z*) *Secus* of a mortgage, or if the consideration were inadequate.

THE Countess Dowager of *Winchelsea* being jointress for her life of the premisses, remainder in tail to the late Earl, remainder over;

1. Ca. Ab. 382.
3. Ch. Rep. 269.

The late Earl entered into an agreement with the Countess, that in case she would make to him a conditional surrender of her estate for life, in order to enable him to mortgage part of the premisses, he would settle the residue of the premisses, together with the equity of redemption, upon himself for life, remainder to his first, &c. son, remainders over, under which the plaintiffs claimed. (1)

[278] The Countess Dowager accordingly makes her conditional surrender: and the late Earl suffered a recovery, and made the mortgage, and afterwards died, without ever settling the premisses pursuant to his agreement, being indebted at his death by bond and judgment, and this agreement was not in writing, but was acknowledged by several letters under the late Earl's hand.

The persons, on whom these remainders were to be settled, brought their bill to have this agreement executed, and had a decree (*a*) for an execution thereof before Lord Chancellor *Harcourt*, which decree was affirmed by the House of Lords.

(*a*) Trin. 1713.

(1) Earl *Heneage* the grandfather of *Charles* the late Earl, had several sons by his second wife, and one son *John*, (the present plaintiff) by *Elizabeth* his fourth wife, who was the Countess Dowager mentioned in this case. Lord *Maidstone*, eldest son of Earl *Heneage* and father of the late Earl *Charles*, died in the life-time of Earl *Heneage*. Earl *Charles* succeeded his grandfather, and upon the death of Earl *Charles* without issue, the title descended upon his uncle, the present Earl, who was the next brother to Lord *Maidstone*. The settlement made by Earl *Charles* was in favour of his half uncle, the plaintiff, in exclusion of his uncles of the whole blood. Vide Reg. Lib. A. 1712. fo. 562.

(*z*) See *Freemoult* v. *Dedire*, post. 429. *Kennedy* v. *Daly*, 1 Sch. & L. 355. 1 Fonb. Eq. 38, note (u).

FINCH *v.* EARL OF WINCHELSEA.

And now the question before Lord Chancellor *Cowper* was, whether the judgment creditors of the late Lord *Winchelsea* should be paid their judgments, being *puisne* to the agreement.

Trustee confesses a judgment: this will not bind the estate.

For the plaintiffs it was objected, that from the time that the late Earl entered into this agreement, it being an agreement made upon a valuable consideration, he [the late Earl] was but a trustee for the uses in the settlement so agreed to be made as aforesaid; and if a trustee confessed a judgment or statute, tho' at law these were liens upon the estate, yet, in equity, they would not affect it; because the estate in equity would not belong to the trustee, but to the *cestuique trust.*

A. articles to sell an estate to *B.* for a full consideration, and receives the money; but before the purchase gives a judgment: this will not bind the estate. *Secus* if he makes a mortgage to one who has no notice.

That if one articled to buy an estate, and paid his purchase-money, and afterwards the person who agreed to sell, acknowledged a judgment or statute to * a third person, who *had no notice,* yet this judgment should not, in equity, affect the estate; because from the time of the articles, and payment of the money, the person agreeing to sell would be only a trustee for the intended purchaser; which was admitted, and affirmed by the Lord Chancellor.

It was granted, that if, in this case, Lord *Winchelsea,* or any other person that had been a trustee in possession, had made a *mortgage* of the premisses *for a valuable consideration, and without notice,* such mortgagee, in regard he might have pleaded his mortgage, and would have been as a purchaser without notice, should have held place against the intended purchaser, or *cestuique trust;* for there the money would have been lent upon the title and credit of the land, and have attached upon the (*a*) land; which would not be so in the case of a judgment creditor, who (for ought appeared) might have taken out execution against the person, or goods of the party that gave the judgment; and a judgment is only a *general security,* not a *specific lien* upon the land.

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(*a*) Vide post, Vol. II. 491. Brace v. Duchess of Marlborough.

Also it was urged, that as the agreement bound the late Earl, so it should bind all claiming under him: consequently the judgment creditors of the late Earl could have no better title than he himself had.

A. conveys an estate by a conveyance which is defective, (viz.) for want of livery, &c. and after confesses a judgment; this will not affect this estate.

For which purpose Mr. *Vernon* cited the case of (1) *Burgh* v. *Francis,* decreed by Lord Keeper *Bridgman,* and affirmed

(1) 1 Eq. Ca. Ab. 320. pl. 1.

FINCH v. EARL OF WINCHELSEA.

by Lord Chancellor *Nottingham*, where there was a defective mortgage in fee for 500*l.* it being made by way of feoffment *without livery*, and after this, the mortgagor confessed a judgment to a third person; nevertheless the estate being in equity

[280] specifically bound by the mortgage, it was decreed, that the mortgage should be preferred to the judgment, tho' at law, the former being in strictness void, the judgment creditor would have taken place.

(*a*) 2 Vern. 564.

So in the case of *Taylor* v. *Wheeler* (*a*) decreed by Lord Keeper *Cowper*, 11 *Nov.* 1706. One seised in fee of a copyhold made a mortgage thereof to *J. S.* but the surrender was not presented at the next court, by means whereof it became in law void; and afterwards the copyholder, [the mortgagor,] who had all along continued in possession, became a bankrupt; and though, on a dispute between the mortgagee and creditors, it was objected, that it was the mortgagee's own fault, that he did not procure the surrender to be presented, and that this was, (probably,) with an ill intent, (*viz.*) to wrong the lord of his fine; that the copyholder being in possession, and the visible owner of the estate, this might, and in all likelihood did, induce his creditors to trust him, as thinking his estate would be liable to their debts; that it was reasonable that all the creditors of the bankrupt should come in equally, and the mortgagee only for his proportion, his mortgage being void at law, and consequently liable to the bankruptcy, and that equality was the highest equity: yet it was decreed, on great deliberation, that this mortgage, tho' void at law, was, notwithstanding, an equitable lien upon the copyhold estate, and should be made good in equity, and bind the assignees of the commission of bankruptcy, and all the creditors. (1)

A. surrenders a copyhold by way of sale or mortgage, but the surrender not presented, and *A.* becomes a bankrupt; this will bind the estate in equity.

On the other side it was insisted, that creditors were the favourites of all courts of law, and much more in equity; that since these creditors now before the court, had a remedy at law for their debts, it would be inverting the proper business of a court of equity, to defeat them of, instead of helping

[281] them to, their just debts, which, without the interposition of equity they would recover.

That in the late Earl of *Pembroke*'s case, upon his marriage

(1) So *Russell* v. *Russell*, 1 Bro. C. C. 269. *Featherstone* v. *Fenwick*, and *Harford* v. *Carpenter*, ib. note.— The general assignees of a bankrupt shall be subject to the same equity, as the bankrupt himself was at the time of the commission. Vide *Jacobson* v. *Williams*, post. 382.

with the now countess Dowager, it was agreed, she should have a rent of 1500*l.* *per annum* jointure; and the method advised by counsel for securing it, was, by demise and re-demise, (*viz.*) the late Earl demised his manors and lands in *Glamorganshire* to the Countess's trustees for ninty nine-years, who redemised the premisses to the late Earl for ninety-eight years reserving 1500*l.* *per annum* during the Countess's life, to commence after the late Earl's death, the lands being of about double that value; after which the late Earl of *Pembroke* died greatly indebted by simple contract; and tho' it was objected, that this term of ninety-eight years, being re-demised to the late Earl as a method only proposed by counsel to serve a particular end, ought, such end being served, to attend the inheritance; and tho' it was (*a*) once so decreed in Lord Chancellor *Jefferey*'s time, yet that decree was afterwards (*b*) reversed, and the reversal acquiesced under by the heir of the late Lord *Pembroke*; for it being legal assets, equity shall never take from a creditor, what, at law, he is intitled to.

(*a*) 2 Vern. 52.
(*b*) 2 Vern. 213.

That the creditors were now in nature of defendants, they coming in before the master, and consenting to be bound by the decree of the court; and the plaintiffs were asking the court to take away the benefit of the law from honest and just creditors.

That this case was not like that of a trustee *out of possession*; for the late Earl, who contracted these debts by judgment, was *in possession*; and as he was seised of the legal estate in fee, so was he also the *visible*, as well as the *legal* owner of the estate; and, upon the credit of this estate, might be supposed to have been trusted for this money; and the judgment creditor might think himself safe by means of the land, and lend upon *that*.

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That there was little difference betwixt a mortgage and a judgment; and yet it had been admitted, that if one articled o sell, and after received the money, and then *mortgaged*, before he conveyed to the purchaser, the mortgagee should hold the mortgage.

It might be granted, that in the case cited of a man's making a defective conveyance, and becoming bankrupt, the creditors should not avoid it, any more than the bankrupt himself; because the creditors stood in the bankrupt's place, and (*a*) could do no more than he could have done himself.

(*a*) Post. 383. Jacobson v. Williams, and Bosvile v. Brander, 459.

But that, in the principal case, the *plaintiffs* claiming under this agreement were in fault, that they did not make fresh

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suit, but delayed it nine years; whereas they ought to have come before for an execution of this agreement, which would (probably) have prevented these creditors from lending their money, or if they had taken a security of the premisses *pendente lite*, it would not have availed them.

Lord Chancellor *Cowper:* Articles made for a valuable consideration, and the money paid, will, in equity, bind the estate and prevail against any judgment creditor, mesne betwixt the articles and the conveyance; but this must be, where the consideration paid is somewhat *adequate* to the thing purchased; for if the money paid is but a *small sum*, in respect of the value of the land, this shall not prevail over a mesne judgment creditor.

[283] In the principal case, the consideration was *not adequate*; for the Countess Dowager of *Winchelsea*, with whom the agreement was made, parted with *no money*, having only made a conditional surrender, in order for a common recovery; besides, I know the inducement with the Lords to affirm the decree, was the plaintiff's proposal to pay the debts by judgment and bond. And the decree intended to provide that the settlement should not prejudice the creditors.

For which reason, tho' that clause was left out in the decree below, yet since the consideration is not adequate, it shall not be so far regarded in equity, as to bar a judgment creditor, who has a legal lien upon the estate. (1)

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(1) Reg. Lib. A. 1714. fo. 365. This cause coming on to be heard for further directions after reference to the Master to state the several claims upon the estate, "His Lordship declared that "the consideration of the agreement "made by the said *Charles* late Earl of "*Winchelsea*, was the giving him a "power to charge 6000*l.* on the join-"ture estate of *Elizabeth* Countess "Dowager of *Winchelsea*, after her "death, and the question is, Whether "the said power is a consideration so "adequate to the settlement that was "to be made for the same, as that the "said agreement ought to prevail against "the creditors of the said Earl by judg-"ment or bond, and that his Lordship "was of opinion that the plaintiff's "equity to have the said agreement "performed, was not strong enough to "stand in the way of the said creditors "who had a legal lien on the said estate, "for that if all the said creditors of the "said Earl should come in and be paid "their debts, the estate to be settled "will still be an over value for what "the said Countess parted with, which "was only a liberty to raise the said "6000*l.* and that not to take place "during her life, but only on the rever-"sion belonging to the said Earl, for "which all the residue of the estate is "to be settled in remainder on her son, "which is very considerable after the "debts paid. And his Lordship further "declared that this his opinion was "agreeable to the order made upon "hearing the cause, in which the like "regard was had to the creditors of the "said late Earl, and which has since "been confirmed on appeal to the House "of Lords." Then follow directions to the Master to sell a sufficient part of the estates for payment of the creditors.

DE TERM. S. MICHAELIS, 1715.

GILLET *versus* WRAY.

CASE 67.

A Man by his will leaves his grand-daughter an annuity of 10*l.* *per annum* for life, and afterwards, by a codicil to his will, declares, that "if his grand-daughter shall marry with the good "liking of his trustees, then she shall have 150*l.* in lieu of "the annuity, and her annuity to cease."

2 Eq. Ca. Ab. 213. pl. 3. One by will leaves an annuity to his grand-daughter; but if she marry with the executor's consent, then a portion; she marries, sans consent, a man worth nothing: husband is not intitled to the money, the having married with the executor's consent being a condition precedent to the gift of the portion. (1)

6. Ves. 463.

The grand-daughter afterwards marries one worth nothing, and without the consent of any of the trustees.

Whereupon it was objected by serjeant *Hooper*, that the restraint of marriage was only *in terrorem*, and that the grand-daughter, notwithstanding her having married as above, ought to have the 150*l.* portion.

But the Lord *Cowper* decreed (2) the contrary, saying, here was a provision made either way, and where the provision for the child is in the alternative, and there is a condition precedent to the gift of the portion, (*viz.*) if *she marries with consent, &c.* and that is not performed, and the child is still provided for, tho' not with the greater portion, equity, in that case, does not relieve.

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(1) Vide *Peyton* v. *Bury*, post. Vol. II. 626. (2) Reg. Lib. A. 1715. fo. 123.

DAGLEY *versus* TOLFERRY.

CASE 68.

A. Having a sister who had four infant children, does by will devise 100*l.* a-piece to these infant children, mentioning no time of payment, and makes the defendant executor, and dies.

Reports of Cases in Equity 103. under the name of Dawley v. Belfry. 1 Eq. Ca. Ab. 300. pl. 2.

Payment to the father, as guardian, of a legacy given to a child, ill; tho' the testator by parol on his death-bed directed it. (3)

(3) According to the report of *Philips* v. *Paget*, 2 Atk. 81. Lord *Hardwicke* expressed his dissatisfaction with this decision.

DAGLEY *v.* TOLFERRY.

It was proved in the cause, that the testator, on his deathbed, gave *directions, that the executor should pay these legacies to the father of the infants, that he might improve the money for their benefit.*

Accordingly, the defendant the executor actually paid these four legacies to the father.

Several years after, the youngest child coming of age, there was an account betwixt the father and the youngest son, and it appeared the father was indebted to this youngest son in 200*l.* (including the 100*l.* legacy) and that the son passed the accounts, and accepted his father as debtor for the same, which was urged, as an agreement to the antecedent payment that had been made of this legacy to the father.

Also after the said youngest son came of age, he never made
[286] any demand against the defendant the executor; so that there was an acquiescence for near fifteen years.

It happened afterwards, that the youngest son being a bankrupt, the commissioners made an assignment of the bankrupt's effects to the plaintiff, in trust for himself and the rest of the creditors, and the plaintiff thereupon brought a bill against the defendant the executor for this 100*l.* legacy, and had a decree for the same, in regard the payment of the legacy to the father and guardian was ill.

And this decree being made by Sir *John Trevor* Master of the Rolls, an appeal was brought before Lord Chancellor *Cowper*, who affirmed the decree; for that (as he said) if the same were reversed, it might encourage payments to parents and guardians, in wrong of infant children; but it was thought a † hard case, and the deposit ordered to be divided.

† The testator's having directed the payment of the legacy to be made to the father of the infant, makes the decree carry with it a great appearance of hardship; for which reason, and because this particular is omitted in the book referred to in the margin, the register's book has been searched, from whence it appears, that the case is here rightly stated, and that great stress was laid on this circumstance in the petition of appeal. (1)

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(1) The principle upon which Lord *Cowper* thought himself bound to decide this case, is rather more fully stated, 1 Eq. Ca. Ab. 300. and see particularly the observations of the Master of the Rolls on this case in *Cooper* v. *Thornton*, 3 Bro. C. C. 96. (*z*)

(*z*) By st. 36 G. 3. c. 52. s. 32. executors are now enabled to pay legacies given to infants, or persons abroad, into the bank of England in the name of the accountant general. And see 37 G. 3. c. 135.

DAY *versus* TRIG. *Before Mr. J.* TRACY *in the absence of* LORD CHANCELLOR.

CASE 69.

ONE devised all his freehold houses in *Aldersgate-street, London,* to the plaintiff and his heirs, and in fact the testator had no freehold houses there, but had leasehold houses there.

2 Eq. Ca. Ab. 323. pl. 20. One devises all his freehold houses in *A.* and hath none *Secus* in a grant.

but leasehold houses there; the leasehold shall pass.

Decreed by Mr. J. *Tracy,* that tho' in a grant of all one's freehold houses, leasehold houses could not pass; and that, in the case of a *will,* had there been any freehold houses to satisfy the will, the leasehold houses should not have passed; yet the plain intention of the testator in the principal case being to pass some houses, and he having no freehold houses there, the word [freehold] should rather be rejected, than the will be wholly void: and the leasehold (1) should pass; and that the suit was proper in equity, since the leasehold houses (being chattels) could not pass by the will without the assent of the executor, which assent he was compellable to give in equity.

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9. East. 366.
10. Cun. 306.
11. — 472.
28. Ch. 2. 68.

(1) Vide *Addis* v. *Clements,* post. Vol. II. 456.

(91) 2. Q. B. 155.

GOSS *versus* TRACY.

CASE 70.

A. By his will had devised his land to his mother in fee, and the mother was afterwards told by *J. S.* that this will would not be good, but ought to be *guarded* (as he called it), and that he would make another will for the testator, which he would take care should be *sufficiently guarded.*

LORD CHANCELLOR COWPER.
2 Vern. 699.
1 Eq. Ca. Ab. 406. pl. 3.
2 Eq. Ca. Ab. 396. pl. 5, 6.

Accordingly *J. S.* drew the will; which was so drawn, that *A.* thereby gave the land to his mother for *life only,* remainder to *J. S.* in fee.

The mother, on the death of *A.* brought a bill to establish the first will, and examined the now plaintiff as a witness to

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prove the ill practices made use of by *J. S.* in obtaining the second will; after which, and before the hearing of the cause, the mother died, having made her will, and given a rent-charge with a clause of distress, out of the estate, to the plaintiff, and devised the lands so charged to others; and there were
[288] divers witnesses examined to prove *A.* the first testator *non compos*, when he made a second will.

A will of land may be good at law, as being well executed, and yet ill in equity, as if obtained by fraud.

Lord Chancellor: A will, tho' good at law, may yet be set aside in equity for † fraud; as if *A.* should agree to give *B.* bank-bills to the amount of 1000*l.* in consideration that *B.* would make his will and thereby devise his lands to *A.* and accordingly *B.* does make such a will, and *A.* gives *B.* the bank-bills, but those bank-bills proved to be forged; this, tho' a good will at law, shall nevertheless be avoided in equity by the testator's heir, for the fraud.

In like manner, if *A.* had devised his lands to his mother in fee, and afterwards *J. S.*, the defendant, had told *A.* the testator, and not the mother (as in the principal case,) that the will was a void will for want of its being well guarded; and that he would make another will for the testator, that should be effectually guarded; and accordingly he had made another will for the testator, whereby the estate had been devised to the mother for *life only*, the remainder to *J. S.* (the defendant) in fee; this would be a good will in law, if attested pursuant to the act of parliament, but would be set aside (1) in equity for the fraud; but as to the evidence of the testator's being *non compos*, that is entirely at law, and to be tried there.

† Et vide in 1 Chan. Rep. (last edit.) 12. 66. instances of a will of land being set aside in equity for fraud.

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(1) Sed vide contrà *James* v. *Greaves*, post. Vol. II. 270. *Bennet* v. *Vade*, 2 Atk. 324. *Webb* v. *Claverden*, ib. 424. *Anon.* 3 Atk. 17. And so with respect to wills of *personal* estate, it belongs *exclusively* to the spiritual court to determine questions of fraud in *obtaining them*, as well as the sanity of the testator. *Archer* v. *Mosse*, 2 Ver. 8. *Nelson* v. *Oldfield*, ib. 76. *Kerrich* v. *Bransby*, 3 Bro. P. C. 358. *Marriot* v. *Marriot*, 1 Stra. 666. *Barnsley* v. *Powell*, 1 Vez. 287. *Bennet* v. *Vade*, ub. sup. *Meadows* v. *Dutchess of Kingston*, Amb. 756. But, it seems, in cases of fraud affecting a *part only* of the will, a court of equity will decree the legatee to be a *trustee* for another. *Marriot* v. *Marriot*, ub. sup. In *Barnsley* v. *Powell*, 1 Vez. 119. 284. Lord *Hardwicke* set aside *for fraud* a deed of proxy, under which probate had been obtained from the spiritual court, and decreed the guilty party *to consent to a repeal of the probate*.

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Secondly, Upon offering the depositions of the plaintiff to be read, it was objected, that the plaintiff's own depositions could not be read, forasmuch as he was a party claiming under the will in controversy, * and so could not be a witness for the will; and Sir *Joseph Jekyll* cited *Tilly*'s case (*a*), where one was examined as a witness, who at that time was no ways concerned in point of interest, but afterwards became interested, and at a trial at bar in this case, the judges of *C. B.* sent a judge to the court of *B. R.* for their opinion in the point, who held, that the depositions could not be read; for that the witness himself was living, and he himself could not have been a witness at that time *vivâ voce,* because he was then interested.

Case where the plaintiff himself a good witness: as where a witness is examined, who at that time is disinterested, but afterwards becomes interested and plaintiff in the cause, his depositions shall be read.

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(*a*) Salk. 286.

But *Lord Chancellor,* in the principal case, because the witness was a good witness, and disinterested at the time of the deposition taken, and this being in the nature of a bill of revivor, to have the benefit of the proceedings in which the plaintiff was examined, admitted † the plaintiff's own depositions to be read. (1)

After which, the court directed (2) an issue in *Middlesex* where the will was made, (tho' the lands lay in *Shropshire,*) to try, whether the will, by which the lands in fee were devised to the wife, was the last will of the testator *A.*

Upon this occasion serjeant *Hooper obiter,* put the following case, as having happened in his experience, *viz. J. S.* was the surviving subscribing witness to a bond, and afterwards the obligee in the bond made *J. S.* the surviving witness, his executor; in an action * brought by *J. S.* the executor, upon this bond, the court allowed evidence to prove the plaintiff's hand to the bond, he being disabled himself to give evidence, as much as if he was dead.

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Surviving witness to a bond is made executor of the obligee; in an action brought by him on the bond, evidence shall be admitted to prove the plaintiff's hand, as a proof of the bond.

Also in the principal case it was declared, that a grantee,

† See 2 Vern. 472. *Callow* v. *Mime;* where a witness was examined before the hearing while she was interested, but after the hearing she released her interest, and was examined again before the master, and her depositions before the master were allowed to be read.

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(1) So *Haws* v. *Hand,* 2 Atk. 615. *Glyn* v. *Bank of England,* 2 Vez. 42. (*z*)
(2) Reg. Lib. A. 1715. fol. 66.

(*z*) And see *Swire* v. *Bell,* 5 T. R. 371. *Cunliffe* v. *Sefton,* 2 East, 183. *Cope* v. *Parry,* 2 J. & W. 538.

Goss v. Tracy. when he appears to be a bare trustee, is a good (1) evidence to prove the execution of the deed to himself.

(1) Vide *Croft* v. *Pyke*, post. Vol. III. 180. (*z*)

(*z*) At law a trustee or executor taking no beneficial interest, is a good witness to a will. *Goodtitle* v. *Welford*, 1 Doug. 140. *Bettison* v. *Bromley*, 12 East. 250. *Phipps* v. *Pitcher*, 6 Taun. 220. 2 Marsh. 20. S. C. And an executor is a good witness *at law* in a collateral action to increase the assets. *Wilkes* v. *Lister*, 6 Esp. N. P. C. 78; but a different rule prevails in *equity* on the last point. *Fotherby* v. *Pate*, 3 Atk. 604. *Bellew* v. *Russel*, 1 Ba. & Be. 96. *Mulvany* v. *Dillon*, ib. 409. *Floyd* v. *Powis*, cited ib. 413. *Hurst* v. *Beach*, 5 Mad. 353.

Case 71.

SEALE *versus* SEALE.

Pre. Cha. 421. 2 Eq. Ca. Ab. 346. pl. 7. 716. pl. 1. Gilb. Rep. 105. One devises all his money in the government funds to be laid out in the purchase of land of 3 or 400*l.* per annum, to be settled on the eldest son, and the heirs male of his body; remainder to the second son, and the heirs male of his body, &c. and devises the rest of his personal estate to his eldest son, and the heirs male of his body; remainder to his second son, &c. The personal estate cannot be intailed, but the whole vests in the eldest son. (1)

ONE devised that all his money in the government-funds should be laid out in a purchase of lands of 3 *or* 400*l.* a year, and settled on his eldest son *A.* and the heirs male of his body, remainder to his second son *B.* and the heirs male of his body, &c. and bequeathed the rest of his personal estate to *A.* and the heirs male of his body, remainder over, in the same manner.

Where 3 or 400*l.* per annum is directed to be purchased, the court will take it in the largest sense, and construe it to be 400*l.* per annum.

Lord Chancellor: It is clear the personal estate cannot be intailed, but the whole property thereof vests in *A.* As to the other devise, I will construe it in the most liberal sense; and it being directed that lands of 3 *or* 400*l. per annum* should be purchased, it shall be 400*l. per annum.*

(1) So *Butterfield* v. *Butterfield*, 1 Vez. 133. 154. *Stratton* v. *Payne*, 3 Bro. P.C. 257. *Earl of Chatham* v. *Tothill*, 6 Bro. P. C. 450. *Pelham* v. *Gregory*, 5 Bro. P. C. 435. *Duke of Montague* v. *Lord Beaulieu*, 6 Bro. P. C. 255. (*y*)

(*y*) *Chandless* v. *Price*, 3 Ves. 99. *Massey* v. *Hudson*, 2 Mer. 130.

SEALE v. SEALE.

Lands directed to be purchased and conveyed to *A.* and the heirs male of his body, remainder to *B.* equity will not decree it to be settled to *A.* for life, remainder to his first, &c. sons.

And though it was insisted, that this being the case of money directed to be laid out in land, was to be construed like marriage-articles, where lands are covenanted to be settled upon the husband and the wife, and the heirs male of the body of the husband, in which case the court would order a strict settlement, *viz.* to the father for life, remainder to the first, &c. son, to the intent that the husband might not bar it. And for the same reason should do so here:

Yet *Lord Chancellor* said this case differed: for that in marriage articles the children are considered as (*a*) purchasors; but in the case of a will, (as this was) where the testator expresses his intent to give an estate-tail, a court of equity ought not to abridge the bounty directed by the testator. (*z*)

(*a*) Vide ante, 145. Bale v. Coleman.

(*z*) So *Blackburn* v. *Stables*, 2 V. & B. 370. *Lincoln* v. *Newcastle*, 12 Ves. 230. *Stratford* v. *Powell*, 1 Ba. & Be. 25. *Jervoise* v. *Northumberland*, 1 J. & W. 571. *Deerhurst* v. *St. Albans*, 5 Mad. 260.

HOWEL *versus* PRICE, *et è con'*.

CASE 72.

2 Vern. 701. Pre. Cha. 423. 477. Gilb. Chan. 315. 1 Eq. Ca. Ab. 270. pl. 7. 2 Eq. Ca. Ab. 597. pl. 15. Mortgage in fee is made redeemable on payment of 300*l.* and interest upon any Michaelmas day, on six months' notice; mortgagor dies, having devised his personal estate to his wife: personal estate is liable to pay the mortgage.

A. In consideration of 300*l.* made a *Welch* mortgage (*viz.*) a conveyance in fee of 52 *per ann.* in *Wales*, under a proviso to be void, if *A.* his heirs or assigns should pay to the mortgagee or his heirs 300*l.* *on any Michaelmas Day*, giving six months' notice, and the mortgagee to have the rent which should be then in arrear; but there was no bond, or covenant to pay the money.

The mortgagor continued in possession, and paid the interest during his life, and by his will gave some legacies, and devised the surplus of his personal estate subject to his debts, to his wife and daughter, whom he made executors (1), and died. Upon which, the daughter dying soon after, the heir brought his bill against the widow the surviving executrix, to compel the applying of the personal in exoneration of the real estate. [292]

(1) "As well to pay his debts as to levy his debts," Pre. Cha. 423.

HOWEL v. PRICE.

Sir *Jos. Jekyll pro quer'* insisted, that this mortgage was money borrowed, and a debt, of which the mortgagor's paying interest was an evidence; that the (*a*) heir was favoured in equity, beyond an administrator, or an executor; for if a man were to article to purchase an estate in fee and die, the heir should compel the executor to lay out the money, and should take the land when bought; and if equity would favour the heir, so far, as to help him to a *new* estate, *à fortiori*, in this case, would it interpose, to *preserve* to him the *old* one; that the mortgagor's continuing in possession shewed this was only a debt upon the estate; and if the mortgagee had entered, and received the profits, he must have been accountable, and they would have gone towards lessening the debt; nay, and notwithstanding the covenant, that the mortgagee should have the arrears of rent due on the *Michaelmas* day that the money should be paid in, yet equity would not allow that, but they would go towards satisfaction of the mortgage money, so, if the mortgage were evicted, or were not of value to pay, or answer the mortgage money, equity would make the mortgagor answer the surplus.

(*a*) Ante, 174. Lingen v. Sowray; post. 364. Hayter v. Rod, and Vol. II. 175. Edwards v. Countess of Warwick.

Besides, the very loan of the money created a debt in equity, and the over-value of the estate, (*viz.*) 52*l. per ann.* mortgaged for 300*l.* proved it to be so beyond all contradiction.

Mr. *Vernon cont.* This is a conditional sale betwixt the mortgagor and mortgagee, that the mortgagee should have the land, until the mortgagor, or his heirs, should pay the money; but still it was in the election of the mortgagor, whether ever he would pay the money, and the mortgagor was no way compellable to pay it, any more than a pawner is bound to pay the money for which the pawn was made, neither will any action of debt lie for this money.

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I admit, if the mortgage were evicted, or the land not of value, the mortgagee might, in equity, recover the money against the mortgagor; but that would be because of the fraud that the mortgagor would, in such a case, be guilty of; it may be resembled to the case of a father's mortgaging his land (*a*) and dying, whereupon the son enters, though this be a debt, and an incumbrance on the son's estate, when the equity of redemption descends to him, yet as it was never the son's debt, the son's personal estate shall not be applied in exoneration of such mortgage.

(*a*) Salk. 450. and vide post. Evelyn v. Evelyn, Vol. II. 664.

Lord Chancellor asked, whether there had been any precedent in this case, and said, that here did not appear to be any contract, either expressed, or implied, for the payment

of this mortgage-money; nor was the mortgagor any ways compellable in his life-time to pay it; and if so, why should his executors? That the exonerating of the real out of the personal estate, was the applying one man's estate to the clearing of another's; for which he could see no reason. *Sed adjourn.* for further consideration.

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It seems Sir *Thomas Powis* (as *amicus cur'*) informed the court, that where portions were charged upon an estate, in the common manner of settlements, the personal estate had been decreed to exonerate the land of these portions, tho' there never were any covenants for the payment of them; but Mr. *Vernon* denied that he ever knew of any such decree. (1)

Where portions are charged on land, whether the heir shall compel the personal estate to discharge it.

† Afterwards, this case coming on again to be argued, Lord Chancellor seemed to be strongly of opinion, that the personal estate should be applied in ease and exoneration of the real estate.

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1*st*, For that the father's will had said, that his executors should, *by his personal estate, pay and levy his debts.*

And if (tho' the will were silent) on the testator's dying indebted, the personal estate ought to be applied to pay the debts, in ease of the real estate, *à fortiori* must it be so, when the will was express that all the debts shall be paid thereout.

2*dly*, This 300*l.* mortgage money was a debt, for so is all money (2) borrowed, indeed it was a debt of a special

† *Lunæ*, 28 *Octob.* 1717. On the equity reserved after the trial of an issue that had been directed by the court.

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(1) Et vide contra, *Edwards* v. *Freeman*, post. Vol. II. 435.

(2) The personal estate of a testator shall in all cases be primarily applied in discharge of *his personal* debt (or general legacy), unless he by express words or *manifest* intention exempt it, 2 Atk. 625. 3 Atk. 201. *Haslewood* v. *Pope*, post. Vol. III. 324. *French* v. *Chichester*, 1 Bro. P. C. 192. *Fereyes* v. *Robertson*, Bunb. 302. *Walker* v. *Jackson*, 2 Atk. 624. *Bridgeman* v. *Dove*, 3 Atk. 202. *Earl of Inchiquin* v. *French*, Amb. 33. and 1 Wils. 82. (*z*) S. C. *Samwell* v. *Wake*, 1 Bro. C. C. 144. Duke of *Ancaster* v. *Mayer*, ib 454. (yet it may be so exempted as in *Bampfield* v. *Wyndham*, Pre. Cha. 101. *Wainright* v. *Bendlowes*, 2 Vern. 718. and Amb. 581. S. C. *Stapleton* v. *Colville*, Ca. temp. Talb. 202. *Walker* v. *Jackson*, ub. sup. *Anderton* v. *Cooke*, and *Kynaston* v. *Kynaston*, (cited) 1 Bro. C. C. 456, 457. *Holiday* v. *Bowman*, (cited) ib. 145. *Webb* v. *Jones*, 2 Bro. C. C. 60.) Every loan creates a debt from the *borrower*, whether there be a bond, or covenant, for payment, or not. *Cope* v. *Cope*, 2 Salk. 449. *Howell* v. *Price*, sup. *Balsh* v. *Hyham*.

(*z*) 1 Cox, 1.

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nature, and for which there was a particular remedy; the remedy, in this case of a mortgage, being not by *mutuatus* at law, or by bill in equity, but still it was a plain remedy, (*viz.*) by ejectment to recover the possession on default of payment.

3*dly*, If in this case the mortgagee had been in possession,

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post. Vol. II. 455. *King* v. *King*, post. Vol. III. 358. So it shall be, although such *personal* debt be also secured by mortgage, as in the present case of *Howell* v. *Price*. *Cope* v. *Cope*, ub. sup. *Pockley* v. *Pockley*, 1 Vern. 36. *King* v. *King*, post. Vol. III. 360. *Galton* v. *Hancock*, 2 Atk. 436. *Robinson* v. *Gee*, 1 Vez. 251. Earl of *Belvedere* v. *Rochfort*, 6 Bro. P. C. 520. *Philips* v. *Philips*, 2 Bro. C. C. 273. So lands subject to, or devised for, payment of debts shall be liable to discharge such mortgaged lands, either descended, or devised. *Bartholomew* v. *May*, 1 Atk. 487. Marchioness of *Tweedale* v. Earl of *Coventry*, 1 Bro. C. C. 240. Even though the mortgaged lands be devised expressly *subject to the incumbrance*. *Serle* v. *St. Eloy*, post. Vol. II. 386. So lands *descended* shall exonerate mortgaged lands devised. *Galton* v. *Hancock*, ub. sup. So *unincumbered* lands and *mortgaged* lands both being specifically devised (but expressly "*after payment* of all *debts*,") shall contribute in discharge of such mortgage. *Carter* v. *Barnardiston*, post. 505. and 2 Bro. P. C. 1. But in all these cases, the debt being considered as the *personal* debt of the *testator himself*, the charge on the real estate is merely collateral. The rule therefore is otherwise, where the charge is on the *real* estate *principally*, altho' there be a collateral personal security. Countess of *Coventry* v. *Earl Coventry*, post. Vol. II. 222. *Edwards* v. *Freeman*, ib. 437. *Wilson* v. Earl of *Darlington*, ib. 664. note. *Ward* v. *Lord Dudley*, 2 Bro. C. C. 316. Or where the debt (although personal in its creation) was contracted originally by another, *Cope* v. *Cope*, 2 Salk. 449. *Bagot* v. *Oughton*, post. 347. *Leman* v. *Newnham*, 1 Vez. 51. *Robinson* v. *Gee*, ib. 251. *Parsons* v. *Freeman*, Amb. 115. *Lacam* v. *Mertins*, 1 Vez. 312. *Perkyns* v. *Bayntun*, post. Vol. II. 664. note. *Lawson* v. *Hudson*, 1 Bro. C. C. 58. *Shafto* v. *Shafto*, post. Vol. II. 664. (*z*) note. *Basset* v. *Percival*, ib. (*y*) Earl of *Tankerville* v. *Fawcet*, 2 Bro. C. C. 57. *Tweddell* v. *Tweddell*, ib. 101. 152. *Billinghurst* v. *Walker*, ib. 604. With respect to the priority of application of *real* assets (when the personal estate is either exempt or exhausted,) it seems that 1*st*, the real estate *expressly devised* for payment of debts shall be applied, 2*dly*, (to the extent of the specialty debts) the real estate *descended*, 3*dly*, the real estate specifically devised, subject to a *general charge* of debts. *Galton* v. *Hancock*, ub. sup. *Powis* v. *Corbet*, 3 Atk. 556. *Wride* v. *Clarke* 2 Bro. C. C. 261. note. *Davies* v. *Topp*, ib. 259. note. *Donne* v. *Lewis*, ib. 257. (*x*)—As to marshalling assets, vide *Clifton* v. *Burt*, post. 678.

(*z*) 1 Cox, 207.

(*y*) 1 Cox, 268.

(*x*) See *Stephenson* v. *Heathcote*, 1 Eden, 38. and cases cited in note, p. 46. In *Manning* v. *Spooner*, 3 Ves. 117. Lord *Alvanley* stated the following to be the rule for application of estates in payment of debts: viz. 1st, The general personal estate, unless exempted expressly, or by plain implication; 2dly, Any estate particularly devised for the purpose, and only for the purpose, of paying debts; 3dly, Estates descended; 4thly, Estates specifically devised. And S. P. per Lord *Eldon*, *Harmood* v. *Oglander*, 8 Ves. 124. *Milnes* v. *Slater*, ib. 295.

it would not have made it less a debt, since the creditor would thereby have had his remedy in his own hands.

4*thly*, It was such a debt, as the mortgagor took great care that he, his heirs or assigns might at any time be at liberty to pay off.

5*thly*, The running on of interest, and its carrying interest, was a proof of its being a debt, and the proviso saying, that if the mortgagor, his heirs or assigns, should pay the 300*l.* and *the rent* or *arrear of rent*, &c. in this case by the word [rent] was to be understood the interest or profit of the money, and what the money yielded. [295]

Lastly, He said, from hence it plainly appeared to be a debt, *viz.* that in case a mortgagee died, and the mortgagor came to redeem, he should pay the money to the executor, and not to the heir of the mortgagee, tho' it was a mortgage in fee, it being money secured by, and due upon, land.

Wherefore, upon the whole, his Lordship thought it a strong case in favour of the heir, and decreed accordingly.

8. Lin. 65.

WARING *versus* DANVERS.

CASE 73.

THE plaintiff was a simple-contract creditor of *J. S.* the testator, for 40*l.* for goods sold and delivered, and filed his original against the defendant the executor, in order to recover his debt; and there being several other simple-contract creditors, they offered the plaintiff to come in for his proportion of his debt with the other simple-contract creditors; but the plaintiff, having first filed his original, insisted upon being paid his whole debt, in preference to the rest.

At the Rolls.

Executors, in equity, as well as at law, may prefer any creditor in equal degree; or, after an action at law brought by one creditor, may confess judgment to another. (1)

Upon which, the executor and the other simple-contract creditors entered into articles, agreeing, that first the executor should be paid his debts, and in the next place, that all the other simple-contract creditors should equally share the [296]

(1) So *Morrice* v. *Bank of England*, Ca. temp. Talb. 225. (*z*)

(*z*) *Maltby* v. *Russel*, 2 Si. & Stu. 80. *Prince* v. *Nicholson*, 1 Marsh. 280. 227. and see *Pease* v. *Naylor*, 5 T. R. 2 Fonb. Eq. 407.

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assets betwixt them, exclusive of the plaintiff; and in order to bar the plaintiff at law, the executor gave judgment in the several *quantum meruits* brought by the other simple-contract creditors, for the several sums of money which were laid as the damages in the declarations, without ascertaining the damages by writ of enquiry; but care was taken, that those damages laid in the several declarations should not exceed the real debt.

And on a bill brought by the simple-contract creditor, who was thus excluded by the articles between the defendant the executor, and the other creditors; and all this matter being disclosed by the answer,

1*st*, It was agreed, that both in law, and equity, an executor might retain for his whole debt when in equal degree.

Next it was insisted upon by Mr. *Vernon*, that as an executor might prefer himself, so might he prefer any other creditor in equal degree.

It was true, after the commencement of an action, an executor could not pay another creditor, before such other creditor had recovered judgment; but still the executor was at liberty to confess such judgment as he had done here, and he might do it in such manner as here was done, *viz.* by confessing judgment for the damages laid in the declaration; and if this was for more than the just debt, the plaintiff at law might reply, that such judgment was not *pro vero et justo debito;* that in the Lord *Orford*'s case (1) in the House of Lords, upon an appeal from a decree in Chancery, it was adjudged, that an executor, in case of legal assets, might give judgment to any one creditor, in preference to another; and that though in the case of *Joseph* and *Mott* (*a*) it was decreed, that an executor, pending an action at law, or *bill in equity*, could not confess a judgment to another, yet that case was cited in this of Lord *Orford*'s in the House of Lords, but did not prevail, and that Lord *Orford*'s case had settled this point.

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(*a*) Pre. Cha. 79.

That, besides the authority above mentioned, the reason of the thing was very strong, *viz.* that wherever a creditor could gain an advantage at law, equity should not deprive him of it; for all creditors had but an equal equity, and therefore where one of them had got an advantage at law, he ought to keep it. *Vigilantibus jura subveniunt.*

(1) *Darston* v. Earl of *Orford*, Pre. Cha. 188. and post. Vol. III. 401. note F. (*z*)

(*z*) Colles, P. C. 229.

WARING v. DANVERS.

Cur'. If the plaintiff desires it, I will send it to the Master to see, whether the judgments confessed to the other creditors be for more than their real debts; but in this case, the plaintiff not thinking it worth his while, the court dismissed the bill without costs, it being so hard a case; but afterwards, on consideration, the Master of the Rolls gave costs, and the decree, on appeal, was affirmed by the Lord Chancellor.

RAWLINS *versus* POWEL.

CASE 74.

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2 Eq. Ca. Ab. 438. pl. 29. 491. pl. 2. Executor has a legacy, and no express disposition of the surplus: on a bill brought by the next of kin for a distribution, the executor answers, and waives the benefit of the surplus by mistake of the law in that point; denied to amend his answer, (*z*) tho' he proved the testator intended he should have the surplus.

A. and *B.* had been fellow apprentices, and *A.* had a great friendship for *B.* to whom he owed, upon an open account, monies computed to be upwards of 300*l.* and being a bachelor, but having brothers and sisters, made his will, giving a legacy of 500*l.* to *B.* and also legacies to his brothers *and sisters, and appointed *B.* executor, without expressly disposing, by his will, of the surplus of his personal estate; soon after which he died.

38. Ch. D. 375

The brothers and sisters, as next of kin to the testator, brought a bill against *B.* the executor, alledging, that he was but a trustee, as to the surplus of the personal estate, there being no disposition of it, and he having an express legacy. Also insisting, that the legacy of 500*l.* should be deemed a satisfaction of the debt which *A.* owed to *B.*

The executor put in an answer, by which he *admitted himself accountable for the surplus*, but insisted that he ought to have the legacy, beyond his debt.

But afterwards, understanding, that some resolutions subsequent to the case of *Foster* and *Munt* (*viz.*) in the (*a*) Duchess of *Beaufort*'s case, and that of *Ball* and *Smith*, had allowed, that though there was an express legacy given to the executor, and no devise of the surplus to him, yet the executor should, on the particular circumstances of the case, have such surplus,

(*a*) Vide ante, 114.

(*z*) See *Livesy* v. *Wilson*, 1 V. & B. 149. *Strange* v *Collins*, 2 V. & B. 163. *Edwards* v. *M'Leay*, ib. 256. *White* v. *Godbold*, 1 Mad. 269. *French* v. *Myles*, 4 Mad. 404. *Maggridge* v. *Hodgson*, 2 Anst. 443. *Harris* v. *Daubeny*, 3 Anst. 717. *Dagley* v. *Crump*, 1 Dick. 35.

RAWLINS *v.* POWEL.

he prayed, that he might amend his answer; but was denied by (*b*) the Master of the Rolls.

(*b*) Sir John Trevor.

And on hearing the cause, his Honor decreed (1) the legacy to the executor over and beyond the debt, but ordered that, having waived the surplus by his answer, he should account for it to the next of kin, though there was strong proof, that the testator intended the surplus to the executor, and had directed the scrivener to insert in his will a bequest thereof to him; but that the scrivener said this was unnecessary, for that the executor would take this surplus of course. (2)

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Legacy shall be taken in satisfaction of a portion.

From this decree the plaintiffs appealed to the *Lord Chancellor Cowper*, where it was urged for the appellants, that this legacy must go in satisfaction of the debt; that every one must be just before he is bountiful; and that it had been decreed, where a father was bound to give a portion with his child, and afterwards by his will gave a legacy to such child, of as great, or greater value, than the portion, this should be (even in the case of a child) a satisfaction of the portion; (3) and they cited the maxim in the civil law, *debitor non præsumitur donare.*

Legacy not taken in satisfaction of a debt upon an open account, where it was uncertain on which side the balance was.

Lord Chancellor. The nature and circumstances of this debt are material; for if it was upon an open and running account, betwixt the testator and his executor, (as is insisted by some of the counsel) so that it might not be known to the testator, whether he did owe any money to the executor, or not; then the testator could not intend the legacy to be in satisfaction of a debt, which he did not know that he owed, any more, than a legacy can be a satisfaction of a debt contracted (*a*) after the making of the will; and this case differs much from that of a bequest from a parent to a child, of a legacy which was as great, or greater, than the portion which the father was bound to give such child: for, in that case, the intent of securing the portion was only that the child might be provided for by the parent; which end was answered by the parent's giving an adequate, or greater legacy to the child by his will; and then such legacy might be taken to be in exoneration of the land, which (probably) was before charged with it. But let it go to the Master to state how this debt did arise, with all the circumstances of it.

(*a*) Salk. 508. & post. Chancey's case, 408.

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With regard to the other point of the surplus, his Lordship

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(1) Reg. Lib. B. 1715. fo. 63.

(2) As to the effect of parol evidence in these cases, vide Lady *Gainsborough's* case, cited ante 9. 116. *Rachfield* v. *Careless*, post. Vol. II. 158.

(3) Vide *Copley* v. *Copley*, ante 147.

RAWLINS v. POWEL. 13. Jur. 548.

said, upon the plaintiff's petitioning to re-hear, the cause was open as to the whole, and every part of it with respect to the defendant; while, in relation to the plaintiffs, it was only open as to those parts of it complained of in the petition; that it would do very well, if this point concerning the surplus were once settled, and certain, either way; yet in this case, where the defendant himself had, by his answer, waived any title to the surplus, he would not, against his own concession, decree it for him. (1)

But in *Easter* term 1718, this cause coming on upon the Master's special report, Lord Chancellor *Parker* said, he could not but incline to help the defendant, who by mistake, or misadvice only of his counsel, was in a way of losing his right. Therefore, if the plaintiffs would bind the defendant by his answer, from taking the surplus as executor, they ought to take it upon the terms in the answer, (*viz.*) the executor waives the surplus, but insists on his debt and legacy; and consequently decreed that the defendant, in this case, should have both his debt and legacy; even though the legacy appeared, by the Master's report, to be much greater than the debt. (2)

(1) As to the effect of a concession by an answer, vide *Pearce* v. *Grove*, 3 Atk. 523. Amb. 65. (*z*)

(2) Reg. Lib. B. 1717, fo. 504. Et vide *Matthews* v. *Matthews*, 2 Vez. 637. (*y*)

(*z*) *Spurrier* v. *Fitzgerald*, 6 Ves. 548. *Young* v. *Walter*, 9 Ves. 364. *East India Company* v. *Keighly*, 4 Mad. 16.

(*y*) *Field* v. *Mostyn*, 2 Dick. 543. *Wallace* v. *Pomfret*, 11 Ves. 542.

ANONYMOUS.

CASE 75.

REGULARLY, the answer of one defendant shall not be made use of as evidence against another defendant; but one defendant saying by his answer, that he was much in years, and could not remember the matter charged in the bill, but that *J. S.* was his attorney, and transacted this matter, and *J. S.* the attorney being made a defendant, and giving an account of the matter:

In some special cases the answer of one defendant may be read against the other. (*z*)

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(2 So *Bennet* v. *Walker*, 1 Dick. 130.

ANONYMOUS. Here, upon a motion for an injunction, Lord *Cowper* said, these words in the first defendant's answer amounted to a *referring to* the co-defendant's answer, and *for that reason* the attorney's answer ought to be read, and accordingly was read against the first defendant.

CASE 76.

ANONYMOUS.

Injunction upon an attachment or dedimus, &c. does not stay proceedings in the spiritual court, without special order. (z)

AN injunction upon an attachment, or a *dedimus*, or upon the defendant's praying time, does not extend to stay proceedings in the spiritual court, as it does to stay proceedings at law; so that whenever proceedings in the spiritual court are to be stayed, it is to be moved specially. *Quære*, whether the same rule does not hold with regard to proceedings in the court of admiralty?

(z) So *Reed* v. *Bowyer*, 1 Price, 101; and the same rule applies to the Court of Admiralty, *Macnamara* v. *Macguire*, 1 Dick. 223.

10. ad. Rel. 232.

DE TERM. S. HILLARII, 1715.

CASE 77.

COOK *versus* OAKLEY *et al'*.

Sir JOHN TREVOR, Master of the Rolls.

2 Eq. Ca. Ab. 323. pl. 19. 438. pl. 32. One being on shipboard, and intitled to part of a considerable leasehold estate by the death of his father, which he did not know he had a right to, makes his will at sea, and devised to his mother (if living) his rings, and makes *A.* his executor, and devises to *A.* his red box, and all things not before bequeathed: this shall not pass the leasehold interest, or what the testator did not know he was intitled to, but shall be restrained to things ejusdem generis.

GILBERT Cook, one of the five children of *Benjamin Cook*, went beyond sea in his father's life; after which, his father, being possessed of a considerable leasehold estate, devised two thirds of his said estate to his five children equally, and one third to his wife, and died; then the wife died, having devised her third to her children equally.

Afterwards *Gilbert* the son, having been beyond sea many years, and being on ship-board, made his will, and gave

to his mother (if alive) his gold rings, buttons, and chest of cloaths, and to his loving friend, the defendant *Francis Goslin,* (who was on board with him) his red box, arrack, *and all things not before bequeathed* ; and made him sole executor.

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It appeared in the cause, (and indeed by *Gilbert*'s will,) that he did not know that his mother was actually dead, and consequently could not know what estate was given him by his mother ; and tho' he knew his father was dead, yet he was not informed what will his father had made, or what his father had left, or whether he was intitled to any part of his estate.

And it was insisted on behalf of the testator's brothers and sisters, that here being an express legacy given to the executor, (*viz.*) the testator's red box and arrack, it could not be presumed, but that if the testator had also intended to give him his share in the leasehold premisses, he would have mentioned them ; and if he did not know he had any such share in the leasehold estate, then it was plain he could not intend to dispose of it ; and the devise of all things not before bequeathed, could not be intended to pass the leasehold interest, or real chattels, but mere personal things only ; such as were on board the ship, or things *ejusdem generis* with those abovementioned (1) ; that it was to be intended he did not know that he was intitled to any part of this leasehold estate of his father, in regard, he would (in all probability) have given some share thereof to his mother, to whom he gave, and for whom he seemed to have designed, the most valuable part of his substance ; for he gave to her his rings, buttons, and chest of cloaths. It was also considerable, that *Goslin,* was a mere stranger ; and on the other hand, the testator had so near relations as brothers and sisters, and that the will had been made on ship-board.

The Master of the Rolls decreed, (2) that *Goslin,* the executor, should be but a trustee, as to the surplus, for the testa-

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(1) Vide *Trafford* v. *Berridge*, 1 Eq. Ca. Ab. 201. pl. 14. *Timewell* v. *Perkins*, 2 Atk. 103. *Cornforth* v. *Boon*, 2 Vez. 279. (*z*)

(2) Reg. Lib. A. 1715. fo. 191.

(*z*) *Rawlings* v. *Jennings*, 13 Ves. 39. Anon. ante 267. *Doe* v *Weatherley*, 11 East. 322. *Bland* v. *Lamb*, 2 J. & W. 399. *Stuart* v. *Bute*, 1 Dow. 73. *Cavendish* v. *Cavendish*, 1 Cox, 77.

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tor's brothers and sisters; but that with respect to the buttons, rings, &c. given to the mother, they were lapsed legacies, by reason of the mother's dying in the testator's life-time, and should therefore fall to the executor. (1)

Subsequent marriage, and having children, construed a revocation of a will. (2)

Also upon this occasion his Honor mentioned a † case, that he remembered to have been adjudged, where a man made a will, and appointed *J. S.* (who was no relation), his executor; afterwards he went beyond sea, where he became governor of one of the plantations, and sent over for an *English*

† This case appears, in another part of our author's reports, to have been that of *Eyre* v. *Eyre*, which the Master of the Rolls (Sir *John Trevor*) said, was reported to him by *Treby* C. J. and some eminent civilians. See also the case of *Lug* v. *Lug*, Salk. 592. (*w*) where a will of personal estate was presumed to be revoked by alteration of circumstances. But more particularly the case of *Brown* v. *Thompson*, heard at the Rolls 8 *Dec.* 1701. where Sir *John Trevor* held, that a subsequent marriage, and having children, was a revocation of a will of *land*, and dismissed the bill of the legatees claiming legacies charged on the estate by such will. I find indeed in the Register's book, that Lord Keeper *Wright*, in the *July* following, reversed the order of dismission, and decreed the payment of the legacies; but in the Abridgment of Cases in Equity, page 413. it is said, that it was on the particular circumstances of that case; and that my Lord Keeper allowed the Statute of Frauds and Perjuries did not extend to an implied revocation.

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(1) Not as executor, but as legatee of a *particular* residue (viz. of what the testator had on board the ship) which legacy excluded him from the *general* residue, vide *Petit* v. *Smith*, ante, 7.

(2) *Parsons* v. *Lanoe*, Amb. 557. *Wellington* v. *Wellington*, 4 Burr. 2165. *Jackson* v. *Hurlock*, Amb. 487. (*z*) *Christopher* v. *Christopher*, 4 Burr. 2171. (*y*) *Spragg* v. *Stone*, Amb. 721. *Brady* v. *Cubitt*, Dougl. 31. (where many other cases are cited); from which it appears that *no* change in the situation of a testator can amount to more than a *presumptive* revocation of a devise of *lands*, and consequently that evidence is admissible to rebut such presumption. That a disposition of the *whole* estate will be *presumptively* revoked by a subsequent marriage *and* birth of a child; *Sed quære*, Whether either of those circumstances *singly*, or only a *partial* disposition of the real property will raise the presumption. (*x*)

(*z*) 2 Eden. 263.

(*y*) 2 Dick. 445.

(*x*) To constitute a presumptive revocation of a devise of land, there must be both marriage and the birth of a child, *Ex parte Ilchester*, 7 Ves. 348. *Doe* v. *Barford*, 4 M. & S. 10. The testator must have been childless, or at least have had no son. *Sheath* v. *York*, 1 V. & B. 390. The devise must include the *whole* estate. *Kennebel* v. *Scrafton*, 2 East, 541: And the new objects of duty must be left unprovided for, ib. Whether declarations of the testator can be received as evidence to rebut the presumption when raised, has been much questioned, and they would probably now be rejected. *Doe* v. *Lancashire*, 5 T. R. 49. *Gibbons* v. *Caunt*, 4 Ves. 849. *Kennebel* v. *Scrafton*, ub. sup. 5 Ves. 663. *Pole* v. *Somers*, 6 Ves. 326; and see note to *Jackson* v. *Hurlock*, 2 Eden, 273. 2 Fonb. Eq. 353. note b. Note to *Duppa* v. *Mayo*, 1 Williams's Saund. 278. a.

(*w*) 1 Ld. Ray. 441.

woman of his acquaintance, whom he married and had children by, and died without any actual revocation of his will; yet it was determined, that this total alteration of the testator's circumstances, was an implied revocation of the will; and in affirmance of this, Sir *Joseph Jekyll* cited this case from the civil law, *pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est* (*a*) *nulla.*

(*a*) Vide Cic. de Oratore, Cantab. Ed. pag. 69. 102. & Dig. L. ult. de Hæred. Inst.

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DYOSE *versus* DYOSE.

CASE 78.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 553. pl. 8. A residuary legatee, on a deficiency of assets, allowed to come in pari passu with the other legatees, by reason of the special circumstances of the case.

MR. *Dyose* of *Gray's Inn* had a wife and three sons; his real estate was small, but he had a personal estate amounting to near 20,000*l.* and by his will (*inter al'*) gave 3000*l.* a-piece to his two younger sons, (1) and the surplus to his eldest son, and made his wife executrix and guardian to his children, who were then all infants, and shortly after died.

On his death, it appeared that the bulk of his personal estate consisted of few *items, viz.* in *East-India* stock, bank-stock, and monies in the government funds.

1. Bea. 404.
2. Keen. 15-5.
3. Ch. D. 542.

Afterwards the wife married one *Lyndall,* who converted great part of Mr. *Dyose*'s personal estate, and went beyond sea; and the two younger sons bringing their bill in this court for the 3000*l.* legacy, it was urged that it would be hard on the eldest son, to whom the father intended to be most bountiful, if he must be postponed to his two younger brothers, by their being first paid their legacies of 3000*l.* a-piece with interest, before the eldest son should come in for any thing.

Lord Chancellor: Let the Master take an account of what was the clear personal estate of the testator *Dyose,* at his death; and this personal estate lying in a narrow view, and consisting chiefly but of few *items:*

(1) And he gave to his wife *Hannah* for ever a particular estate "to encourage "a further provision, which he designed "she should make for his younger children, his eldest son *William being* "*sufficiently otherwise provided for by* "*his said will, and being made resi-*"*duary legatee thereof.*"

DYOSE *v.* DYOSE.

His Lordship was of opinion, that the testator *Dyose* must, at the making of his will, know what his surplus would amount unto, after his debts and legacies paid; and that he meant this surplus as a legacy to his eldest son: wherefore the Court (1) declared, it ought to be looked upon as such; and directed, that the Master should compute interest, as well for what was the surplus of the testator's personal estate *at his death*, for the eldest son, as for the two legacies of 3000*l.* a-piece to the two younger sons; and if any of the three sons had received any part of the personal estate of the father, the other two were, in the first place to receive as much, so as to put them all upon an equal footing; and afterwards all the three sons were to receive *pari passu*, in respect of the value of the surplus given to the eldest son, which was to be taken as a legacy, and in regard to the legacies of 3000*l.* each to the two younger sons. (2)

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(1) Reg. Lib. A. 1715. fo. 335. This declaration, and the reasons for it, make part of the decree, which then proceeds to give the directions stated above, with the addition, that the deficiency of the remaining personal estate of the testator to satisfy the said legacies, and such surplus as should be found to have been due at the time of the death of the testator with such interest as aforesaid, should be made good by the defendant *Hannah Lyndon*, the executrix to her said children, *Henry*, *Thomas*, and *William*, together with their costs of the suit.

(2) *Sed vide Fonnereau* v. *Poyntz*, 1 Bro. C. C. 478. (*z*) in which Lord *Thurlow* expresses his disapprobation of the present case.

(*z*) *Humphreys* v. *Humphreys*, 2 Cox, 184. And see *Page* v. *Leapingwell*, 18 Ves. 463. *Attorney-General* v. *Grote*, 3 Mer. 316. *Ex parte Chadwin*, 3 Swan. 380.

CASE 79.

ATTORNEY GENERAL *versus* MAYOR OF COVENTRY.

LORD CHANCELLOR COWPER.

2 Vern. 713. Grantee of fee-farm rents has the same power of distress as the king had; and so may distrain on other land of the tenant, tho' not subject to the rent.

THE Earl of *Aylesford* was intitled in fee-simple to a fee-farm-rent of 50*l. per annum*, reserved to the Crown upon the grant of King *Edw.* 1. of divers franchises to the Corporation of *Coventry*, which rent being amongst others, sold by the Crown by virtue of the statute of 22 Car. 2. cap. 6.

(for the advancing of the sale of fee-farm-rents,) became vested in the said Earl; and by the words of the above mentioned statute, as full a remedy is given to the King's patentees, their heirs and assigns, as the King himself had, excepting an extent.

So that the Earl of *Aylesford* (among other privileges) might undoubtedly have distrained for this fee-farm-rent upon *any other* of the lands belonging to the Corporation of *Coventry*; but the lands of that Corporation being under sequestration, for the non-payment of a sum of money decreed to belong to Sir *Thomas White's* charity, this made the difficulty. [307]

And the Lord Chancellor, having called to his assistance the Chief Justices *Parker* and *King*, held,

First, That the King might reserve a rent out of a franchise, or matter incorporeal, as well as out of lands, and might distrain on any other lands of the tenant for it.

The king may reserve rent out of things incorporeal, and may distrain for this rent on any other lands of the tenant; but not on such other lands of the tenant as are let out by tenant, or extended. *Q.* If he may distrain on other lands of the tenant under sequestration?

Secondly, That tho' by virtue of the said statute of Car. 2. the grantee of a fee-farm-rent had the like remedy, by way of distress, as the King himself had; yet that such other lands must be in the actual possession of the tenant: for if the tenant should have made any lease for years, or at will only, the goods or chattels of such an under-lessee were not distrainable even by the King, and consequently not by his grantee.

Thirdly, That as any lease made by the King's tenant, of the lands not held of the King, would prevent even the King's distress: so if there were an extent upon an *elegit* of such other lands, the goods or chattels upon the premisses so extended, would not be liable; for this was a greater estate than an estate at will.

But it was said, a sequestration (1) was only in nature of a *levari* at common law, and that the party sequestering had

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(1) As to the nature and operation of a sequestration, vide *Bligh* v. *Earl of Darnley*, post. Vol. II. 622. *Wharam* v. *Broughton*, 1 Vez. 180. *Desbrow* v. *Crommie*, Bunb. 272. (*z*)

(*z*) *Hyde* v. *Greenhill*, 1 Dick. 106. *Barnsley* v. *Powell*, ib. 130. *Bray* v. *Hooker*, 2 Dick. 638. *Hales* v. *Shaftoe*, ib. 711. 1 Ves. jun. 86. 2 Cox, 224. S. C. *Shaw* v. *Wright*, 3 Ves. 22. *Simmonds* v. *Kinnaird*, 4 Ves. 735. *Angel* v. *Smith*, 9 Ves. 337. *Fenton* v. *Lowther*, 1 Cox. 315. *Payne* v. *Drewe*, 4 East. 523. *Dixon* v. *Smith*, 1 Swan. 457. *Dickinson* v. *Smith*, 4 Mad. 177.

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no *jus ad rem, vel in re,* the legal estate of the premisses remaining, in every respect, as before; and that it would be an extreme hardship, if such process of sequestration should be allowed to be made use of, to hinder a plain precedent right of another.

Sequestration is favoured as an execution and fruit of a long suit.

On the other side it was argued, that since a sequestration was the execution and life of a Court of Equity, and was the fruit of a long suit, so for that reason, it ought to be favoured. However, the matter ended in this: the Lord Chancellor held, he could not (as was prayed) order the sequestrators to pay the arrears of the fee-farm-rent out of the money or rent sequestered; in regard the Earl of *Aylesford,* the claimant thereof, had no decree, or bill for the same; nor was there any contempt, on which the Court could ground a sequestration, as to the said Earl, in respect to his fee-farm-rent, so as to let him have the benefit of this sequestration; and should the sequestrators be ordered to pay him the arrears of the fee-farm-rent, this would be to put the Earl in a better condition, than he would have been in, had there been no sequestration.

Wherefore the Court ordered that the Earl of *Aylesford* should be at liberty to distrain for his rent at law, without incurring any contempt in equity; and that no lease or estate derived under the sequestrators, should be made use of in evidence against the claimant of the fee-farm-rent to prevent the distress. (1)

Afterwards C. J. *Parker* informed me, that he thought it might have been proper to have determined, that the sequestration was as the hand of the Court upon the estate, and where a right to a fee-farm-rent appeared to be prior and indisputable, the court might reasonably enough have ordered payment; else the Earl, for ought appeared, would be in a worse condition, than if there had been no sequestration; for

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(1) Any person making claim to the property sequestered, shall be examined upon interrogatories *pro interesse suo,* and if he shall appear to have title paramount to the sequestration, it shall be discharged as against him, with or without costs, according to the circumstances of the case. Gilb. Forum Romanum, 80. 1 *Harrison's Pract.* 310. (*z*) *Wharam* v. *Broughton,* 1 Vez. 180.

(*z*) 144. edit. Newl. And see *Hunt* v. *Priest,* 2 Dick. 540. *Anon.* 6 Ves. 288. *Angel* v. *Smith,* 9 Ves. 337. *Dixon* v. *Smith,* 1 Swan. 457. *Brooks* v. *Greathed,* 1 J. & W. 176. *Kaye* v. *Cunningham,* 5 Mad. 406.

till the sequestration, the corporation paid the fee-farm-rent voluntarily, and now they were disabled purely by the sequestration, and putting the Earl to distrain, was putting the charge of this suit upon the estate; whereas nothing appeared to the contrary, but that the corporation was sensible of the Earl's right to the rent, and desired it might be paid.

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As to the King's power of distress on any lands of the tenant, though not held of the King, 5 Co. 4. 56. 1 Roll. Abr. 670. 2 Rol. Abr. 159. 2 Inst. 132. 4 Inst. 119. Lane, 39. were cited.

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40. Ch. D. 324.

TWISLETON *versus* GRIFFITH.

CASE 80.

IN a bill brought to set aside a sale of a reversion, the case appeared to be, that the plaintiff's father was tenant for life, remainder to the plaintiff in tail, remainder over to a third person.

2 Eq. Ca. Ab. 510. pl. 1. A son who after his father's death is a remainder-man in tail, sells this remainder at an under rate: Court set aside the conveyance. (1)

That the plaintiff the son, having married a wife with a small portion, thereby incurred his father's displeasure; but upon the wife's father advancing 500*l.* for her portion, the father made a proportionable settlement, and received the son and his wife into his house.

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(1) So *Berney* v. *Pitt*, 2 Vern. 14. *Knott* v. *Johnson*, ib. 27. *Wiseman* v. *Beake*, ib. 121. *Cole* v. *Gibbons*, post. Vol. III. 290. *Earl of Chesterfield* v. *Jansen*, 1 Atk. 342. 351. and 2 Vez. 144. 155. S. C. *Barnardiston* v. *Lingood*, 2 Atk. 133. *Gwynne* v. *Heaton*, 1 Bro. C. C. 1. (*z*)

(*z*) *Peacock* v. *Evans*, 16 Ves. 512. *Gowland* v. *De Faria*, 17 Ves. 20. *Davis* v. *Marlboro'*, 2 Swan. 139. *Carleton* v. *Leighton*, 3 Mer. 667. *Shelly* v. *Nash*, 3 Mad. 232. *Bernal* v. *Donegal*, 3 Dow. 133. *Roche* v. *O'Brien*, 1 Ba. & Be. 330. *Marsack* v. *Reeves*, 6 Mad. 108. *Fox* v. *Wright*, ib. 111. And see *Tweddell* v. *Tweddell*, 1 Tur. 1.

TWISLETON *v.* GRIFFITH.

Afterwards, the defendant, having been an attorney, (tho' he had left off practising for a considerable time, yet) took upon him to advise and direct the plaintiff in every thing, and professed great friendship for him; and after his father was reconciled to him, and when the plaintiff, being in debt, was desirous to sell this reversion to his father, who proposed

[311] giving him 1000*l.* for the same, the defendant by letter dissuaded him from it, declaring that this was no valuable consideration.

But in about a year afterwards, when the plaintiff's father was ancient and sickly, and a very declining life, the defendant himself bought this reversion of the plaintiff for 1050*l.* when the estate was worth 150*l. per annum;* and the plaintiff at this time was thirty-four years of age, and had a child about ten years old, who was inheritable to the intail; and the plaintiff levied a fine of this reversion to the defendant.

In about two years' time, the plaintiff's father died, and upon the plaintiff's bill to set aside this conveyance; he, in order to gain an injunction, by the direction of the Court, suffered a common recovery, and declared the uses of it to the two senior six clerks, subject to the order of the Court.

And now it was argued for the defendant, that here was no fraud in obtaining this conveyance; that the defendant ran a hazard of losing his 1050*l.* in case the plaintiff had died without issue, in the father's life-time; and it appeared, that the plaintiff himself bought a commission to go into the army; and the child, being about ten years old, was subject to many diseases, that might take him off, as the small-pox, &c. and as the defendant ran the hazard, so he ought to have the benefit thereof; that if such a transaction as this, were liable to be impeached afterwards in a court of equity, it would be almost impracticable for an heir ever to sell a reversion; and that a purchase, if fairly made, was not to be set aside merely for its having turned out a good bargain.

[312] But Lord Chancellor decreed relief upon payment of principal and interest, and full costs; grounding his opinion, chiefly, upon the case of (*a*) *Berney* and *Pitt*; where the plaintiff's father was tenant for life of a considerable estate, remainder in tail to the plaintiff, remainder over; and the defendant lent the plaintiff the two several sums of 1000*l.* and 1000*l.* upon which the plaintiff *Berney* gave two judgments of 5000*l.* a-piece defeasanced each of them to pay 5000*l.* in case

(*a*) 2 Vern. 14. One lent an heir 1000*l.* to pay 2,500*l.* if he survived his father, else nothing: equity relieved.

the plaintiff should survive his father, and to pay interest for the same, in case he should marry in the life of his father; but if he should die in the life of his father, then the principal was to be lost. TWISLETON v. GRIFFITH.

This cause was first heard by (*a*) Lord *Nottingham*, who denied relief: and after that the then plaintiff had been constrained to pay the money, (*viz.*) 5390*l.* upon the decree; yet upon the (*b*) re-hearing before the Lord *Jeffereys*, his Lordship did relieve; declaring, that these bargains were corrupt and fraudulent, and tended to the destruction of heirs sent to town for their education, and to the utter ruin of families; and that the relief of the court ought to be extended to meet with such corrupt bargains and unconscionable practices.

(*a*) 33 Car. 2.

(*b*) Hill. 2 Jac. 2.

Accordingly, Lord *Cowper* said, this also was the case of an heir, and who was the less upon his guard with the defendant, as he pretended nothing to him but friendship, by incouraging him to leave his father's house, and dissuading him from selling the reversion to his father for 1000*l.* which was but 50*l.* less, and this a year before; that the reason inducing the Lord *Jeffereys*'s decree, was, (probably) to discourage a growing practice of devouring an heir, on a confidence in Lord *Nottingham*'s decree; but Lord *Jeffereys*'s decree standing, shewed that every one thought the same was just; and that there was therefore no attempt in Parliament to reverse it.

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His Lordship added, he saw no inconvenience in the objection, that at this rate, an heir, without difficulty, could not sell a reversion; this might force an heir to go home, and submit to his father, or to bite on the bridle, and indure some hardships; and in the mean time, he might grow wiser, and be reclaimed.

Wherefore let the plaintiff be relieved on payment of principal, interest, and full costs; I mean *liberal* costs. (1)

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(1) As to costs, see *Gwynne* v. *Heaton*, 1 Bro. C. C. 1. (*z*)

(*z*) *Carwin* v. *Millner*, 19 June, 1731, 19 Hill's MSS. 167. The plaintiff had borrowed of the defendant 500*l.* and given a bond and judgment to pay 1000*l.* on the death of his father, or father in law, in case he survived either of them. The father in law died four months afterwards, and the plaintiff tendered the defendant the 500*l.* and interest, which defendant refused. Lord Chancellor *King*, in consideration of the tender, refused the defendant his costs.

DE TERM. S. TRINITATIS, 1716.

CASE 81.

COPEMAN *versus* GALLANT.

2 Eq. Ca. Ab. 113. pl. 2. Bankrupt, though in possession, yet if impowered to dispose of goods in trust for another, they are not liable to the bankruptcy, either in law or equity.

A. MADE a bill of sale of some leases and personal estate to *B.* and *C.* in trust to pay *A.*'s debts; at first *B.* acted in the trust; but afterwards *C.* took the whole into his possession, and acted alone, and became a bankrupt.

2. Ch. 44.

Upon which *A.* brought a bill against *C.* and others, to bring *C.* and his assignees under the commission of bankruptcy to an account touching the personal estate of *A.* so assigned in trust for the payment of his debts, as aforesaid. And Lord *Cowper* being about to pronounce his decree for the plaintiff, (*viz.*) that the defendant should account, said, that he bethought himself, there was a clause in one of the statutes of bankrupts which might affect this case, where it was declared, that "the trusting goods in the possession of a
[315] "bankrupt, this gave him credit, and induced others to trust "him, and therefore, should make the goods liable to the "bankruptcy;" wherefore he directed that the statutes should be looked into, and particularly the clause in the 21st of Jac. 1. cap. 19. sect. 10. & 11. which being accordingly read, appeared to be in the following words: (*viz.*)

"And for that it often falls out, that many persons, before "they become bankrupts, do convey their goods to other men "upon good consideration, yet still do keep the same, and "are reputed the owners thereof, and dispose of the same as "their own, be it enacted, that if at any time hereafter, any "person or persons shall become bankrupt, and at such time "as they shall so become bankrupt, shall by the consent and "permission of the true owner and proprietary, have in their "possession, order, and disposition, any goods or chattels, "whereof they shall be reputed owners; and take upon themselves the sale, alteration, or disposition as owners, that "in every such case such goods shall be liable to the bank-

" rupt's debts, as if they had been the proper goods of the " bankrupt." (*z*).

Upon the reading of which clause, Lord Chancellor declared that he thought this clause governed the case then before him, and thereupon dismissed the plaintiff's bill with costs.

But I, being of counsel for the plaintiff, and reading the clause of the statute, did, at the rising of the court, desire, that we might have another day to speak to this clause, it being a very hard case, which Lord Chancellor granted; and accordingly, at (*a*) another day in *Trinity* term 1716, the cause coming on upon this point only,

(*a*) June 9.

I observed, that the printer of the statute books mistakes, in *dividing* this paragraph of the act on which the present question depends, and in making it no part of the precedent clause, so that this clause being read to the court, without the preamble, and as a substantive clause, had the greater weight against us; and, indeed, in like manner, the last words of this very clause (*viz.*) [for the better payment of bankrupts debts, and discouraging of men to become bankrupts] belong to the next following paragraph of the act, though made, by the printer, part of this.

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But probably, this will be of no weight with the court; in regard, it will be taken, as if the paragraphs were all rightly divided, it being a plain mistake of the printer, and in the act itself, in the parliament rolls, there are no paragraphs, but a continuation throughout of the same lines.

But as to the principal question, it is to be observed, that the chief end of the statute was, *to punish frauds committed by the bankrupt.* For,

In the clause just preceding this, it enables the commissioners to proceed when the bankrupt, by fraud, makes himself accountant to the King.

Also, if the bankrupt fraudulently conceals his goods, or will not give an account how he became a bankrupt; this act subjects the bankrupt to the (*b*) pillory, and to the loss of one of his ears.

(*b*) Vide sect. 7.

So that the clause in question, was intended only to prevent a *fraud* in the bankrupt: and not to punish an innocent man, or a third person; and all the meaning of this clause is, that if the bankrupt himself assigns over *his own goods*, and still continues in possession, and acts as owner of them, they

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(*z*) See st. 6 Geo. 4. c. 16. s. 72.

COPEMAN v. GALLANT.

shall be liable to his debts; for the continuance of the possession is a strong presumptive evidence of fraud; but this preamble extends only to such goods, as were originally in the bankrupt, and continued in his possession.

I must admit, the words of the clause are general; but I take it, that according to the common rule of construing acts of parliament, and the reason of this case, the generality of the enacting clause shall be qualified by the preamble, which is special and particular, and expressly said to be the reason of making the act.

Preamble of an act of parliament proper to explain the general words in the body. Quære tamen, & vid. post. 320.

The preamble of the act has been always thought material in the construction of it; and by the Lord *Coke* it is called the key of the act of parliament, to open and explain the meaning thereof.

And the preamble in this case saying, "for that bankrupts "frequently convey over *their* goods, and yet continue in "possession and dispose of them, be it enacted, &c." (so that first the mischief is recited, and then comes the remedy,) therefore it is reasonable to construe that the remedy shall not be larger than the mischief; this is the common rule, and it is much more reasonable that it should hold in the present case, where, if the clause should not be restrained by the preamble, it would occasion a manifest hardship.

[318] If in any case an act of parliament shall be restrained by the preamble, it shall in this; to prevent a third person, an innocent person, from being wronged; to prevent the application of the estate of a third person towards satisfying the debt of another, and leaving his own debt unpaid.

This is as harsh a thing, especially in equity, as can well be imagined; it is a construction that utterly ruins the plaintiff, nay, ruins him for being honest, and for making an honest provision for his debts; since his own creditors, whom he thought, and might reasonably think, he had provided for, will be unpaid, by this construction, and will come upon the plaintiff for their demands.

This very case has received a determination at law (*Michaelmas* term 1708), in the case of *L'Apostre* versus *Le Plaistrier*, where an action of trover for a parcel of diamonds, was brought against the defendant as assignee under the commission of bankruptcy awarded against one *Levi*, to whom, before the bankruptcy, the plaintiff had delivered the diamonds to sell; but it appearing upon the trial (which was before C. J. *Holt*) that the real property of the diamonds belonged to the plaintiff, this very clause of the statute of 21 Jac. 1. was insisted

upon by the defendant's counsel; and this seeming an hardship upon the plaintiff, the original owner of the jewels, it was made a case in the King's Bench, where, on argument, it was adjudged, that the general words of this clause ought to be explained by the preamble; and that these jewels, being originally the plaintiff's, and the bankrupt having no more than a bare authority to sell them for the plaintiff's use, were not liable to the bankruptcy. COPEMAN v. GALLANT.

Now this, as well as the principal case, was within the words of this clause; in both cases, the goods were in the bankrupt's custody, and he, in both cases, was intrusted with a power of selling and disposing of them; only it was more likely, in the case cited, that the jewels might gain credit to the bankrupt, and might induce people to trust him, than that the stock of the farm should do so in the principal case; and if, in the case cited, the jewels were held not to be liable to the bankruptcy, no more shall the goods be, in the principal case; and if the law be with us, it would be very strange that equity, in so hard a case, should be against us. [319]

Suppose a factor, who deals in the selling of the goods of other people, should become a bankrupt, would it not be a very hard case, that, by his bankruptcy, the goods of other people must be lost? Factor in possession, and impowered to sell goods for another, they are not liable to the factor's bankruptcy.

And yet this must be the consequence of this decree, if it should stand, as pronounced, against my client; but (with submission) the law and practice are held to be otherwise. (1)

Suppose an executor in trust, of a large personal estate, and where there are great debts, should become a bankrupt, would this personal estate, because the executor had a power over it before the bankruptcy, but never executed such power, be liable to all the bankrupt's debts, and in the mean time all the testator's debts remain unpaid? And yet this would be the consequence, if the clause in question were to be construed according to the words, and were not to be restrained by the preamble. Executor in trust becomes a bankrupt; the goods which he has as executor not liable to the bankruptcy.(2)

These cases often, very often happen; and consequently these hardships would as often happen, if the goods in [320]

(1) Vide *Godfrey* v. *Furzo*, post. Vol. III. 185. Ex parte *Marsh*, ib. 158. *Howard* v. *Jemmet*, 3 Burr. 1369. (*z*)

(2) So, *Ex parte Ellis*, 1 Atk. 101.

(*z*) *Joy* v. *Campbell*, 1 Sch. & L. 328.

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the principal case were to be liable to the bankruptcy; therefore I hope, that this harsh clause in the statute, though it be general, shall yet be qualified, and restrained by the preamble which is special, and shall extend only to the bankrupt's own goods which he himself aliens and assigns, and still keeps possession of; or to such cases only, where there is some *fraud*, which, like an ill leaven, will infect the whole mass.

But if the court should be of another opinion, still this case is out of the clause of the statute of 21 Jac. 1. because the first assignment, which comprehends the whole personal estate of *A.* is made to *B.* as well as *C.* And therefore *C.* who afterwards became a bankrupt, had not, alone and without the joining of *B.*, a power over this estate, and consequently we are not within this statute, though taken in any sense.

Lord Chancellor: I can by no means allow of the notion, that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves, import; which (with some heat) his Lordship said was a ridiculous notion; and instanced in the (*a*) *Coventry* act, which, if it had recited the barbarity of cutting *Coventry*'s nose, and the enacting clause had been general, (*viz.*) against the cutting of *any member* whereby the man is disfigured or defaced, it might with equal reason be objected, that cutting of the lips, or putting out the eye, would not have been within the act, because not within the preamble. (1)

(*a*) 23 Car. 2. cap. 1.

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(1) But this opinion of Lord *Cowper*'s with respect to the operation of the preamble, is expressly disapproved by Lord Chief Baron *Parker* and Lord *Hardwicke* in *Ryall* v. *Rowles*, 1 Atk. 175. 182. and 1 Vez. 365. 371. S. C. and they held the present case of *Copeman* v. *Gallant*, to be well decided on the construction of the act as restrained by the preamble. Et vide Ex parte *Flyn*, 1 Atk. 185. *Mace* v. *Cadell*, Cowp. 232. *Walker* v. *Burnell*, Doug. 317. *Collins* v. *Forbes*, 3 T. R. 316. *Jarman* v. *Woolloton*, ib. 618. (*z*)

(*z*) *Gordon* v. *E. I. Company*, 7 T. R. 228. *Darby* v. *Smith*, 8 T. R. 82. *Lingham* v. *Biggs*, 1 Bos. & P. 82. *Horn* v. *Baker*, 9 East. 215. *Ex parte Smith*, Buck. 149. 152. note (a). *Ex parte Dale*, ib. 365. *Fox* v. *Fisher*, 3 B. & A. 135. *Oliver* v. *Bartlett*, 1 Bro. & B. 269. *Gibson* v. *Bray*, 1 B. Moor. 519. The more modern cases are against such restrained con-

However, his Lordship held this case not to be within the clause of the statute of 21 Jac. 1. in regard this assignment to *B.* and *C.* was with an honest intent, (*viz.*) for the payment of the debts of the assignor. COPEMAN *v.* GALLANT.

Therefore the assignees under the commission of bankruptcy sued out against *C.* were ordered to account for all the estate of *A.* which the court declared should not be liable to the bankruptcy of *C.*

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struction of the act, particularly in the case of dormant partners; and it seems that the true reason of the decision in the principal case, is the bankrupt's having been a trustee. *Ex parte Dyster*, 2 Rose, 256. *Ex parte Enderby*, 2 B. & C. 389. *Smith* v. *Watson*, ib. 401. overruling *Coldwell* v. *Gregory*, 1 Price, 119.

AMBROSE *versus* AMBROSE. CASE 82.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 267. pl. 17. 275. pl. 5. Pre. Cha. 537.

A. a freeman of London, purchases in the name of *B.* but no trust declared; *A.* dies, and *B.* gives a declaration of trust; this is good against the custom.

A. WHO was a freeman of *London*, purchased an estate in the names of *Edward Ambrose* (an attorney at law) and one *Hales*, who was the clerk of *Edward Ambrose*, and the consideration money (being 9400*l.*) was mentioned in the conveyance to be paid by *Edward Ambrose.*

There were proofs of *A.*'s going down to view the purchase, and that he declared he would buy it in the name of *Edward Ambrose*, and that he desired to conceal it from being known to be his purchase, by reason that he was but an inferior officer in the office of coinage in the tower of *London*, and on the recoinage, had, in one year, got an estate of upwards of 20,000*l.* which he would have concealed. There was also full proof, that the whole purchase-money was the proper money of *A.*

Evidences of a trust where an estate is purchased in another's name.

On the other side it appeared, that *Edward Ambrose* kept the writings, and received the rents of that part of the estate that was let, and that *A.* by a paper (all of his own handwriting) dated 4 *May*, 1699, and purporting to be an estimate or calculation made by him of all his estate, and what he was worth at that time, had charged *Edward Ambrose*, as debtor to him, for money lent him to buy the said estate, and also for interest due on account thereof. [322]

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But that the said *A.* dying, and leaving a widow and three daughters, and *Edward Ambrose* appearing to be an insolvent person, the wife and friends of *A.* advised with the common serjeant of the city, to know, what was the proper method to be taken for the securing of *A.*'s estate; who advised, that *Edward Ambrose* should give a declaration of trust, purporting that this purchase-money was the proper money of *A.* and that the purchase was made in the name of *Edward Ambrose* in trust for *A.* which was accordingly done; but this declaration was given after *A.*'s death, and some money (about 300*l.*) was also given to *Edward Ambrose* to procure this declaration of trust from him.

Whereupon, on a bill brought by the daughters and coheirs for an account of the rents and profits of this estate, it was now insisted by the widow of *A.* that, her husband being a freeman, and this purchase not being intended, much less compleated, in *A.*'s life time, and the declaration of trust being only advised by the friends of the family, as the most prudent and effectual method to secure the said debt, upon *A.*'s death, the same ought to be looked upon as in nature of a personal estate; and consequently, that a right vested in her by the custom of *London* to a share of this money in the hands of *Edward Ambrose*, which right could not be alter-
[323] ed or eluded by such subsequent declaration of trust.

But decreed by the Lord Chancellor, that the strength of the evidence was, that this purchase made in the life of *A.* in the names of *Edward Ambrose* and his clerk, was in trust for *A.* However, it plainly appearing, upon the evidence on both sides, that the consideration-money of this purchase was the proper money of *A.*, had it not been for the statute of frauds, this would have made a resulting trust (*z*); and the said *Edward Ambrose*, after the death of *A.* executing the declaration of trust, this plainly took it out of the statute.

And as to the objection, that the declaration of trust should not by relation prejudice *A.*'s wife who was a third person:

His Lordship answered, that the declaration given by *Edward Ambrose*, was evidence of the trust, and all evidence must affect a third person; and as, if *Edward Am-*

(*z*) See *Anon.* 2 Vent. 361. *Anglesey* v. *Altham*, 2 Salk. 676. *Gascoigne* v. *Thwing*, 1 Vern. 366. Sugd. Vend. ch. 15. s. 2.

brose had, after the death of *A.* been examined as a witness, and had declared on his oath, that he was but a trustee for *A.* this would have bound *A.*'s wife, and would have barred her pretence; so here the declaration of trust executed by *Edward Ambrose*, was rather a stronger evidence of the trust, and ought to bind the wife of *A.* But considering all circumstances, the court recommended it to the heirs or devisees of *A.* that they would agree to let *A.*'s wife come in, in this case, for her dower of this trust-estate.

AMBROSE *v.* AMBROSE.

This decree was affirmed in the House of Lords in *June* 1717.

3. Bea. 327.
2. Russ. & Myl. 263.
3. Myl. & Keen. 410. 1916. 1. Ch. 147
1. Keen. 789. 1918. 1. Ch. 565.
8. Sim. 460.

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BLANDY *versus* WIDMORE.

CASE 83.

LORD CHANCELLOR COWPER.

2 Vern. 709. Gilb. Chan. 327. 2 Eq. Ca. Ab. 352. pl. 11. Covenant to leave his wife 620*l.* Party dies intestate, and wife's share comes to above 620*l.*: this is a satisfaction.(1)

UPON the marriage of *A.* with *B.* there were articles reciting, that, in consideration of the marriage and of the portion, it was agreed, that if *B.* the wife should survive *A.* her intended husband, *A.* should leave *B.* 620*l.*; and accordingly *A.* covenanted with *B.*'s trustees, that his executors, within three months after his decease, should pay *B.* 620*l.* if she should survive him. *A.* died intestate, and without issue; upon which *B.* the wife, by the statute of distribution, became intitled to a moiety of the personal estate, which was much more than 620*l.* and the question was, whether the distributive share belonging to *B.* being more than 620*l.* should go in satisfaction of it?

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(1) The present case and that of *Lee* v. *D'Aranda*, 3 Atk. 419. and 1 Vez. 1. (S. C.) have been considered rather as cases of actual *performance* than of *satisfaction* of covenants, (vide *Barret* v. *Beckford*, 1 Vez. 520. *Prime* v. *Stebbing*, 2 Vez. 411.) In the cases on the subject of *satisfaction*, in which the contracting party is supposed to have done some other thing in lieu of the thing contracted for, and which therefore depend more particularly on the implied intention of the party, several rules of presumption have been adopted which do not seem to apply to the cases of *performance*, (vide *Eastwood* v. *Vinke*, post. Vol. II. 616.) In cases of *satisfaction* the presumption will not hold where the thing substituted is less beneficial (either in amount, or certainty, or time of enjoyment, or otherwise) than the thing contracted for, since *satisfaction* implies the doing of something *equivalent*, and the presumption is so much weakened where the thing *substituted* is not equivalent to the thing *contracted for*, that a part *satisfaction* will not be intended, whereas in cases where the thing *done* can be considered as a *part performance* of the thing *contracted for*, it shall be so taken. As in covenants to settle lands of a certain

BLANDY *v.* WIDMORE.

Serjeant *Hooper:* This 620*l.* is a debt, and debts must be first paid, after which the distribution is to be made; and if the intestate had made a will, probably he would have given to his wife something additional to this 620*l.* Now, what the statute gives is not his gift, and being not his gift, is not to be taken as his payment; or supposing it to be his gift, still it cannot be said to be his payment.

Lord Chancellor: I will take this covenant not to be broken, for the agreement is to leave the widow 620*l.*; now the intestate in this case, has left his widow 620*l.* and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore let her take it; but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant; so that she shall not come in first as a creditor for the 620*l.* and then for a moiety of the surplus.

[325] And Mr. *Vernon* said, it had been decreed in the case of *Wilcox* v. *Wilcox* (*a*) *Trin.* 1706, that if a man covenants to settle an estate of 100*l. per annum* on his eldest son, and he leaves lands of the value of 100*l. per annum* to descend upon such son, this shall be a satisfaction of the covenant to settle; and that this last was a stronger case, it being the case of an heir, who is favoured in equity; also the case of (*b*) *Phinney* v. *Phinney* was cited:

(*a*) 2 Vern. 558.

(*b*) 2 Vern. 638. cited also post, 628. in the case of Trevor v. Trevor.

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value, the subsequent purchase by the covenantor of lands of a *smaller* value (which are at his death left undisposed of) shall be intended to be a *part performance* of such covenant, as it may be presumed he meant to purchase more lands afterwards and settle the whole according to the covenant, (*Lechmere* v. *Earl of Carlisle*, post. Vol. III. 211.) In the case of *Lee* v. *D'Aranda*, (as well as in the present case of *Blandy* v. *Widmore*) the distributive share amounted to more than the money provided by the covenant, for the personal estate (according to Atkyns's report) was 2300*l.* of which the widow was intitled to one moiety, the next of kin being brother and sister of the intestate, (as appears by Reg. Lib. B. 1746. fol. 359.) and not his children, as mentioned in the report. These therefore were not in fact, cases of a *part* performance only, but the language of Lord *Hardwicke* in Atkyn's report of *Lee* v. *D'Aranda*, seems to apply to a *part* performance as strongly as to a *full* performance of the contract. But on this head see more in *Haynes* v. *Micoe*, 1 Bro. C.C. 129. *Kirkman* v. *Kirkman*, 2 Bro. C. C. 95. *Rickman* v. *Morgan*, ib. 394. (*z*)

(*z*) See *Richardson* v. *Elphinstone*, 2 Ves. jun. 463. *Goldsmid* v. *Goldsmid*, 1 Swan. 211. 221. where the principal cases on this subject are collected and arranged.

Whereupon the decree made (1) by Sir *John Trevor* Master of the Rolls, was now affirmed by Lord Chancellor *Cowper*. (2)

(1) Feb. 15, 1715. Reg. Lib. A. 1715. fol. 203.

(2) And again affirmed upon a rehearing, 30th June, 1715. Reg. Lib. A. 1715. fol. 372.

LORD LANESBOROUGH *et al' versus* JONES.

CASE 84.

A. is a goldsmith, and there is mutual credit betwixt *A.* and *B.* and *A.* becomes a bankrupt; only the balance shall be liable to the bankruptcy: not material whether the mutual credit be by open account, or mutual stated debts. (3)

SAMUEL JONES Esq.; borrowed 1500*l.* of *Coggs* the goldsmith on mortgage, and *Coggs* owed about 1400*l.* to *Jones*, upon his the said *Coggs*'s notes; the notes were payable to the Bishop of *London*, *Hatton Compton*, and the said *Samuel Jones* or order, but this was in trust for the said *Samuel Jones*; and the Bishop, *Hatton Compton*, and *Samuel Jones*, had all indorsed the notes, which were in the custody or power of *Jones;* and *Jones* went to demand the money of *Coggs*, who agreed to allow *Jones* 5*l. per cent.* for the money on the notes, till payment.

Coggs failed afterwards; and an act of parliament was made for the vesting the effects and estate of *Coggs* in trustees, (the plaintiff Lord *Lanesborough* and others,) who were to act in nature of commissioners and trustees for the creditors of *Coggs*, and they insisted, that *Jones* the mortgagor should pay all the mortgage money, but that as to the money due

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(3) This subject has received further regulation by statute 5 G. 2. c. 30. (*z*) Vide *Ryall* v. *Rowles*, 1 Ves. 375. As to the general construction of the clauses respecting mutual credits, vide *Ex parte Deeze*, 1 Atk. 228. *Ex parte Prescot*, ib. 230. *Ex parte Ockenden*, ib. 235. *French* v. *Fenn*, Cooke's Bank. Laws, 577. (*y*) *Grove* v. *Dubois*, 1 T. R. 112. *Bize* v. *Dickson*, ib. 285. *Hankey* v. *Smith*, 3 T.R. 507. *Whitehead* v. *Vaughan*, Cooke's Bank. Laws, 587. *Smith* v. *Hodson*, 4 T. R. 211. (*x*)

(*z*) And by St. 6. G. 4. c. 16. s. 50.

(*y*) 536. 7th Edit.

(*x*) *Ex parte Stephens*, 11 Ves. 24. *Ex parte Huckey*, 1 Mad. 577. *Morris* v. *Cleasby*, 4 M. & S. 566. *Gowen* v. *Tritton*, 1 Holt. N. P. C. 408. *Ex parte Flint*, 1 Swan. 30. *Peele* v. *Northcote*, 1 B. Moor. 178. 7 Taun. 478. *Ex parte Blagden*, 2 Rose. 249. *Graham* v. *Russell*, 2 Marsh. 561. 3 Price 227. *Ex parte Ross*, Buck. 125. *Ex parte Whitehead*, 1 G. & J. 39. *Curson* v. *African Company*, 1 Vern. 121.

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on *Coggs*'s notes, *Jones* should come in, under the commission, only *pro ratâ*, with the rest of the creditors.

But decreed by Lord Chancellor *Cowper*, with great clearness, that in regard, by the late statute of 4 Ann. cap. 17. sect. 11. it is enacted, That where there is mutual credit between a bankrupt and another, only the balance shall be paid: so in this case, here was a plain mutual credit, (*viz.*) *Coggs* gave credit to *Jones* on the mortgage, and *Jones* gave credit to *Coggs* on his notes, and therefore the balance should only be paid; and this clause in the statute was not to be construed of dealings *in trade* only, or in case of mutual running accounts; but that it was natural justice and equity, that in all cases of mutual credit, only the balance should be paid, and that the commissioners or trustees in this act of parliament, should not be in a better condition than *Coggs* himself would have been in; that if, instead of the present bill which was to foreclose the mortgage, *Coggs* himself, before his bankruptcy, had brought such a bill, surely no more than the balance should have been allowed him; and there was no reason that *Jones* should suffer by the accident of *Coggs*'s bankruptcy; neither could the commissioners, or if *Coggs* had been in the case of a common bankrupt, could the assignees, be in a better condition than *Coggs* himself would have been in.

But it seems, if *A.* and *B.* are joint traders, and *J. S.* owes *A.* and *B.* on their joint account 100*l.* and *A.* owes the said *J. S.* 100*l.* on his separate account, *J. S.* cannot deduct so much, as *A.*'s proportion of the 100*l.* comes to, out of the joint debt; for that the copartnership debts of *A.* and *B.* are to be (*a*) first paid, before any of the separate debts; but if there be a surplus beyond what will pay the partnership debts, then, out of *A.*'s share of the surplus, *J. S.* may deduct the separate debt of *A.* (1)

(*a*) Vide 2 Vern. 293. 706.

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(1) Vide *Ex parte Edwards*, 1 Atk. 100.

CASE 85.

ANONYMOUS.

One devises the surplus of his personal estate to his relations; only such shall take who are capable of taking within the statute of distribution.

IT was said by the Master of the Rolls, and admitted by Mr. *Vernon* and others, to be settled, that where one devises

ANONYMOUS.

the rest of his personal estate to his relations, or to be divided among his relations, without saying what relations, it shall go among all such relations as are capable of taking within the (*a*) statute of distribution; else it would be uncertain; for the relation may be infinite.

(*a*) See Roach v. Hammond. Pre. Cha. 401. but more particularly Car v. Bedford, 2 Cha. Rep. 77. and in 8vo. 146. (1)

But in the principal case, the testator devised the surplus of his personal estate to his *poor* (2) *relations*; and the Countess of *Winchelsea* being a relation, as near as any, to the testator, she was a party to the suit, and claimed a share; and it was decreed, she was intitled thereto, in regard the word [poor] was frequently used as a term of *indearment* and *compassion*, rather than to signify an *indigent* person; as one speaking of one's father, often says, my *poor father*, or of one's child, *my poor child*.

One devises the surplus of his personal estate to his poor relations: how construed. *Q.*

But this seems to have been a strained interpretation in favour of the Earl and Countess of *Winchelsea*, who had not an estate any ways proportionable to their quality.

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(1) So *Thomas* v. *Hole*, Ca. temp. Talb. 251. *Harding* v. *Glynn*, 1 Atk. 469. *Attorney General* v. *Buckland*, (cited) Amb. 71. *Edge* v. *Salisbury*, ib. 70. *Whithorn* v. *Harris*, 2 Vez. 527. *Crossley* v. *Clare*, Amb. 397. *Isaac* v. *Defriez*, ib. 595. *Widmore* v. *Woodroffe*, ib. 636. *Green* v. *Howard*, 1 Bro. C. C. 31. *Hands* v. *Hands*, (cited) 3 Bro. C. C. 69. *Phillips* v. *Garth*, ib. 64. *Rayner* v. *Mowbray*, ib. 234. As to the *proportions*, in which they shall take, vide *Blackler* v. *Webb*, post. Vol. II. 382. But where a residue is given in trust for *such* of the testator's relations *as A. shall judge proper*, *A.* is not confined to the next of kin. *Bennet* v. *Honeywood*, Amb. 708. *Supple* v. *Lowson*, ib. 729. (*z*)

(2) Vide *Brunsden* v. *Woolredge*, Amb. 507. *Isaac* v. *Defriez*, ib. 595. *Widmore* v. *Woodroffe*, ib. 636.

(*z*) In *Macleroth* v. *Bacon*, 5 Ves. 159. an appointment by a married woman in favour of her *husband*, under a power to appoint to her *family*, was sustained under particular circumstances; but in general that term will be confined to next of kin under the St. of distributions, *Cruwys* v. *Colman*, 9 Ves. 319. And see *Garrick* v. *Camden*, 14 Ves. 372. In *Smith* v. *Campbell*, 19 Ves. 400. Coop. 275. a bequest to *nearest* relations was confined to brothers and sisters, tho' there were others who would have shared under the Stat. In *Doe* v. *Over*, 1 Taun. 263. a devise of *real* estate to relations was held to mean those who would have taken under the Stat. And see *Wright* v. *Atkyns*, 17 Ves. 255. 19 Ves. 299. Coop. 111. 1 Tur. 143. *Maitland* v. *Adair*, 3 Ves. 231. *Leigh* v. *Leigh*, 15 Ves. 92. *Anon.* 1 Mad. 36.

DE TERM. S. MICHAELIS, 1716.

Case 86.

BROCKMAN *versus* HONEYWOOD.

Lord Chancellor Cowper.

2 Eq. Ca. Ab. 160. pl. 3. An owner of a quit-rent shall pay taxes only in proportion to what the land pays; but if the matter has been examined by the commissioners of the land tax, this court will not re-examine it. (*z*)

BROCKMAN had a quit-rent of 3*l.* a year, as belonging to his manor of *Dale*, and issuing out of the lands of the defendant Sir *William Honeywood*, who, in the payment thereof, insisted to deduct two shillings in the pound for the land-tax of four shillings in the pound; and summoned the plaintiff before the commissioners to adjust the land-tax on the quit-rent, who accordingly ascertained it at two shillings in the pound; after which the defendant tendered the quit-rent, deducting two shillings in the pound.

On the other side, the plaintiff insisted that the defendant ought to deduct out of the quit-rent only in proportion to what the land, out of which the quit-rent issued, paid; which, in the present case, was less than two shillings in the pound; and that the commissioners of the taxes had no power to ascertain what should be deducted; wherefore he brought this bill, in order to have the court settle the proportion, by sending it to a Master.

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Lord Chancellor: The plaintiff is spending a shilling to get a half-penny. Tho' the commissioners have no power to settle the proportion of taxes, as to what the tenant shall deduct for them out of the quit-rent; yet they being gentlemen of the country, and living upon the spot, and having power to tax the quit-rent, I will look upon what they have done to be a proper measure of justice; and therefore the plaintiff has not done well not to acquiesce under it; so dismiss his bill with costs.

But at the same time I declare my opinion to be (as has been before resolved), that a quit-rent, or fee-farm, in case of payment to the land-tax (suppose a tax of four shillings in the pound), ought not to have four shillings in the pound deducted, unless the land, out of which such rent or fee-farm issues, pays four shillings in the pound, but is to pay only in proportion as such land pays. (*y*)

(*z*) See Parker 82.

(*y*) See *King* v. *Weston*, 2 Eq. Ca. Ab. 62. pl. 2. *Adair* v. *New River Company*, 11 Ves. 429.

CHRISTIAN *versus* CORREN.

CASE 87.

THE Earl of *Derby*, King of the *Isle of Man*, made a decree in that island concerning lands there; and the person, against whom the decree was made, appealed hither.

Before a Committee of Council at the Cockpit.

2 Eq. Ca. Ab. 81. pl. 3. Appeal from a decree in the Isle of Man. The subject cannot be deprived of his right to appeal by any words in the King's grant to that purpose, much less if the grant be silent in that particular.

One (and indeed the principal) question was, whether an appeal did lie before the King in council, there being no reservation in the grant made of the *Isle of Man* by the crown, of the subject's right of appeal to the Crown.

And it was urged for the appeal by myself (who alone was [330] of counsel with the appellant), that it appearing, in this case that H. 4. had granted the *Isle of Man* to the Earl of *Derby*'s ancestors, to hold by homage and other services, though there was no reservation of the subject's right of appeal to the Crown, yet this liberty was plainly implied.

For that such liberty of appeal lay in all cases where there was a tenure of the Crown; that it was the right of the subjects to appeal to the sovereign to redress a wrong done to them in any court of justice; nay, if there had been any express words in the grant to *exclude* appeals, they had been void; because the subjects had an inherent right, inseparable from them *as subjects*, to apply to the Crown for justice. And on the other hand,

The King, as the *fountain of justice*, had an inherent right, inseparable from the Crown, to distribute justice among his subjects; and if this were a right in the subjects, no grant could deprive them of it; the consequence of which would be, that in all such cases, *viz.* where there were words exclusive of such right of appeal, the King would be construed to be deceived, and his grant void: also precedents were cited in point.

Lord Chief Justice *Parker*, who assisted at Council upon this occasion, thought that the King in Council had necessarily a jurisdiction in this case, in order to prevent a failure of justice, and took notice, that if a copyholder should sue by petition in the lord's court, upon which the lord should give judgment, though no appeal or writ of error would lie of such judgment, yet the Court of Chancery would correct the pro- [331]

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ceedings, in case any thing were done therein against conscience. (z)

Whereupon their Lordships proceeded in this appeal, and determined in favour of the appellant; and it is observable, that Lord *Derby* also, at length, rather than that some things in the grant made by the Crown to his ancestors should be looked into, chose to submit, and express his consent, that the matters in question on the appeal should be examined by the King in council.

(z) But see *Ash* v. *Rogle*, 1 Ver. 367.

4. Bea. 223.
10. Sim. 487.
3. Bea. 163.
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43. ch. D. 250.

DE TERM. S. HILLARII, 1716.

Followed 4 Eq. 443.

CASE 88.

1905. 2. ch. 508.
1909. 2. ch. 424.

LORD CHANCELLOR COWPER.

17. 2 Ch. 414
19. 2 Ch. 299

HUMBERSTON *versus* HUMBERSTON.

1910. 1. Ch. C. 1916. 1. Ch. 473. 1917. 1. Ch. 571.

2 Vern. 737. Pre. Cha. 455. Gilb. Rep. 128. 1 Eq. Ca. Ab. 207. pl. 8. 2 Eq. Ca. Ab. 457. pl. 1.

Devise of lands to a corporation, in trust to convey the premisses to his godson *A.* for life, and so to his first son for life; and afterwards to convey the premisses to the first son of that son for life; and in failure of such issue of *A.* to convey it to *B.* for life, &c. this is a perpetuity; but the conveyance shall be made as near the intent of the party as the rules of law will admit, (viz.) by making all the persons in being but tenants for life; but the limitation to the sons unborn must be in tail. (1)

ONE *Matthew Humberston* (reported to have been formerly a *Christ-Hospital-Boy*) devised his estate, which was very considerable, to the drapers' company, and their successors, in trust to convey the premisses to his godson *Matthew Humberston* for life, and afterwards upon the death of the said *Matthew*, to his first son for life, and so to the first son of that first son for life, &c. and if no issue male of the first son, then to the second son of the said *Matthew Humberston* for life, and so to his first son, &c. and in failure of such issue of *Matthew*, then to another *Matthew Humberston* for life, and to his first son for life, &c. with remainders over to very many of the *Humberstons* (I think about fifty), for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them, or making any disposition of the fee.

(1) Vide *Godolphin* v. *Godolphin*, 1 Vez. 21. *Hucks* v. *Hucks*, 2 Vez. 568. *Spencer* v. Duke of *Marlborough*, 5 Bro. P. C. 592. *Chapman* v. *Brown*,

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On a bill brought by the first devisee against several in remainder, the trustees, and executors, and also against the Attorney General, (no heir being to be found,) for an execution of the trusts of the will,

By *Lord Chancellor*: Tho' an attempt to make a perpetuity for successive lives be vain, yet so far as is consistent with the rules of law, it ought to be complied with; and therefore let all the sons of these several *Humberstons*, that are already born, take estates for their lives; but where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male. (1)

2*dly*, Whereas it was objected, that where the limitation, for want of issue male of the first *Matthew Humberston*, gave a remainder over, these words, [for want of issue male of the first *Matthew Humberston*] did by implication create an estate-tail in the said *Matthew Humberston*, precedent to the next remainder: the Court said, that these being words of implication only, after an (*a*) express estate for life, and being in default of (*b*) *such issue*, could not create an estate-tail; and the rather too, in regard this would defeat the intent of the testator, by impowering the first *Matthew Humberston*, by a recovery, to bar all the subsequent remainders.

(*a*) Vide ante, 56. Bamfield v. Popham. (*b*) Vide post, 605. Blackborn v. Hewer Edgley, & e cont'.

3*dly*, In this case the testator, as an encouragement to his executors (who were four) to accept of the trust and executorship, had given to each of them 100*l.* and 12*l.* a-piece for mourning, and to each of them a ring, and 10*l.* a year for their trouble.

Devise to trustees, as an encouragement to accept the trust, of 100*l.* a piece, and 12*l.* for mourning and a ring, and 10*l.* a piece per ann. for their trouble; one refuses, yet he shall have his mourning and ring, but not the 100*l.* legacy and the 10*l.* a year, which, in such case, shall not go to the acting executors, but sink into the estate. (*y*)

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3 Burr. 1626. *Pitt* v. *Jackson*, 2 Bro. C. C. 51. (*z*)

(1) The decree directs that "the "Master should see a settlement made "of the said trust estate pursuant to "the said will, with limitations to the "several persons named to be tenants "for life in the said will and to the "heirs male of their bodies in strict "settlement according to the course of "law; and if any of the parties who "are made tenants for life have any "issue male living, their names are "to be inserted in the said deed of set-"tlement." Reg. Lib. A. 1716. fol. 529. by the name of *Humberstone* v. *Collet*.

(*z*) *Nicholl* v. *Nicholl*, 2 Bla. Rep. 1159. *Somerville* v. *Lethbridge*, 6 T. R. 213. *Marlboro'* v. *Godolphin*, 1 Eden, 404. *Heath* v. *Heath*, 2 Eden, 330. *Routledge* v. *Dorril*, 2 Ves. jun. 357. *Thellusson* v. *Woodford*, 4 Ves. 227. 11 Ves. 112. 1 N. R. 357. *Mainwaring* v. *Baxter*, 5 Ves. 458. *Deerhurst* v. *St. Albans*, 5 Mad. 232. *Beard* v. *Westcott*, 5 Taun. 393. 5 B. & A. 801, 1 Tur. 25. *Bacon* v. *Proctor*, 1 Tur. 31.

(*y*) See *Read* v. *Devaynes*, 3 Bro. C. C. 95. *Abbot* v. *Massie*, 3 Ves. 148.

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Upon which Lord Chancellor said, that notwithstanding the condition of the acceptance might seem to run to all the legacies, yet the executors, though they did not act, should have their rings and mourning, these being intended them immediately, and not to wait their time of acceptance; but that they should not have their 100*l.* and an annuity of 10*l.* each, unless they accepted of the trust; and that the share or annuity of the renouncing executor, should not go over to the acting executors as a further encouragement, but ought to sink for the benefit of the estate.

Harrison v. *Rowley*, 4 Ves. 212. *Freeman* v. *Fairlie*, 3 Mer. 24. *Dix* v. *Stackpoole* v. *Howell*, 13 Ves. 417. *Reed*, 1 S. & S. 237. *Brydges* v. *Wotton*, 1 V. & B. 134.

CASE 89.

BOTHOMLY *versus* LORD FAIRFAX. (1)

LORD CHANCELLOR COWPER.

2 Vern. 750. 1 Eq. Ca. Ab. 144. pl. 19. A recognizance not inrolled shall be looked upon as a bond, and paid as a debt by specialty.

THE late Lord *Fairfax* devised his estate for payment of his debts, which estate being accordingly by the Court decreed to be sold, and the money to be applied for that purpose, with directions, to pay first the mortgages, then the judgments and recognizances affecting the land, and then other debts; and that all the creditors should be at liberty to come before the Master and prove their debts:

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(1) Several points appear by the Register's book to have arisen upon the Master's report in this cause, and to have been decided upon full consideration. Lord *Fairfax* had, (as appears by the order made upon the original hearing of the cause, Reg. Lib. A. 1711. fol. 642.) devised all his real and personal estate (generally) to trustees "upon trust by sale or otherwise to pay "all his debts and funeral expences." The cause coming on to be heard for further directions, the decree first makes a declaration of the right of the creditor by recognizance not inrolled, to come in as a bond creditor only, as stated by the reporter, and then proceeds thus,—"And the next question "arising upon the said report being, "whether several notes given for the "payment of money by the late Lord "*Fairfax*, ought to carry interest and "from what time, his lordship con- "ceived that, since the said notes did "not carry interest in their nature, "they therefore ought not to carry in- "terest until some act fell in to make "them so to do: and since by the tes- "tor's appointment he has let in all "his debts to receive an equal satis- "faction, that therefore the said notes "ought to carry interest from a rea- "sonable time when they might be "supposed to have been paid after his

The Master reported, that one *James Chaplin* had a recognizance from Lord *Fairfax* in the penalty of 1000*l*, for the payment of 500*l*. and interest at 6*l*. *per cent* which recognizance had been assigned by the said *Chaplin* to *Samuel Phillips*, but that this recognizance happening not to be enrolled, therefore he (the Master) submitted it, whether it should be taken as a recognizance, or as a bond only.

And I, being of Counsel for *Phillips* the assignee, argued, that this recognizance should be taken and paid as a recognizance.

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It is the acknowledgment before a competent judge, that gives a recognizance its force, Hob. 196. *Hall* and *Wingfield*'s case (*z*); the inrollment of it, is what is done by a ministerial officer only, and is made use of as a proper method for the preservation of the security for safe custody, and for the notifying it to others; this is further proved by the authorities that say, the recognizance binds the land *from the time of the caption*. 1 Vent. 360. Hob. 196. So that if the cognizor acknowledges a recognizance, and aliens the land, or dies before inrollment, yet the recognizance shall bind the land in the hands either of the alienee, or the heir.

What is said in Hob. 196. in *Hall* and *Wingfield*'s case, seems very material, *viz.* that the first acknowledgment of the cognizor of the recognizance binds his person and his lands, as a record from that time, so that the very acknowledgment of a recognizance before a competent judge, alone makes it a record before the inrollment.

" death if contests had not happened; " and whereas in case of legacies the " Court allows but a year's time after " the testator's death for payment, and " in case of debts there is less reason to " allow a longer time; his Lordship " was of opinion the said notes ought " to carry interest from the end of one " year after the testator's decease. And " one of the said notes being for payment of 56*l*. annuity to *Walter Swyre* " for his life, and the same being a " *voluntary* debt, the question thereon was, Whether the said note ought " to be looked upon as a debt by simple " contract, and his Lordship declared " the same ought to be looked upon " and taken as a good debt by simple " contract; but as setting apart a fund " to answer the said annuity would " be preferring one simple contract creditor before the rest, his Lordship " doth therefore order that the said " Master do set a just value upon the " said annuity, and the said *Walter* " *Swyre* is to come in to receive a " satisfaction for such value as a creditor by simple contract in proportion " with the rest of the simple contract " creditors." Reg. Lib. A. 1716. fol. 171. With respect to the question of interest on the simple contract debts, vide *Car* v. *Countess of Burlington*, ante. 228.

(*z*) *Phettle* v. *Wood*, 2 Ld. Ray. 966. Holt, 612. Salk. 564. 659.

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And, with submission, it is very reasonable it should be so, I mean that the recognizance without the inrollment, should be a perfect recognizance. Since the party, who is to give the security, has done his part by acknowledging the recognizance; the judge, or master in chancery, that takes it, has also done his part, by subscribing the caption; and after all this solemnity, shall the neglect, or nonfeazance of the officer (an officer purely ministerial) prevent this lien from being of any force, by the not enrolling it? this seems very unreasonable.

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I must own, there is a material difference betwixt a recognizance in the nature of a statute staple, or statute merchant, taken by virtue of the statute of *Acton Burnel*, (*viz.* 13 Ed. 1. or other acts of parliament impowering the taking of such statutes), and a recognizance at common law.

It is most true, that those statutes merchant or staple, that are taken by virtue of the statute of *Acton Burnel*, or other acts of parliament, require particular circumstances to be observed in the taking of them; and if in the taking of those statutes, staple or merchant, the acts of parliament are not pursued, then they have not the force of a recognizance.

And it must be admitted to be a favourable construction of the judges, to allow such recognizances defectively taken, to have the force of bonds, by reason of the obligatory words that are contained in them.

As for instance, the statute of *Acton Burnel* requires, that a statute merchant or staple that is given, shall have two seals affixed to it, (*viz.*) the seal of the cognizor, and the king's seal, appointed for that purpose; and to the same effect it is enacted by the statute of 23 Hen. 8. cap. 6. in the case of statutes taken by either of the chief justices.

Now where the case has happened, that only the seal of the cognizor or debtor was affixed to the recognizance, this was void as a recognizance; and in Cro. Eliz. 355. 461. 544. 2 Roll. Abr. 149. *Asme* v. *Hollingworth*, after many arguments, and with great difficulty, it was resolved, that this recognizance, being void as a recognizance, might however be sued as an obligation, by reason of the obligatory words in it.

So a recognizance not regularly taken may be sued as an obligation. (z)

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This (I say) is a benign construction; because a delivery, as well as sealing, is necessary to make a bond; and if *non est*

(z) See *Sheffield* v. *Castleton*, 2 Vern. 393.

factum were pleaded to a recognizance so taken, it would be straining pretty far, to make a debtor's acknowledging a writing, as his recognizance, to amount to the delivery of it, as his deed.

It is plain, where an act of parliament gives a particular power of taking a recognizance or statute, that this act of parliament must be observed, and the circumstances required thereby, complied with; and if omitted, the recognizance intended to be given, is not a recognizance.

Yet it is otherwise in case of a recognizance at common law (as ours in the principal case is) acknowledged before a Master of this Court, and where the acknowledgment or caption of it before a judge, or master, gives the lien it's force.

There is indeed an act of parliament made for the entering or inrolling of statutes and recognizances out of regard to purchasers; as the 27 Eliz. cap. 4. which requires statutes to be brought within four months after the acknowledgment of them to the clerk, to be entered on the roll; and it is thereby enacted, that the statutes shall be entered on the roll within six months after the acknowledgment; else, *quoad* any purchaser, they shall be void.

But this very act shews, that before the making thereof, the statute needed not to be entered on the roll at all, and that even since, it need be entered only in the case of a purchaser; whereas in the principal case, there is no purchaser concerned, and the recognizance is only made use of against the heir, executor, or voluntary devisee of the Lord *Fairfax*, the cognizor thereof. [338]

Therefore, since the recognizance receives its force from the acknowledgment, since it binds the lands of the cognizor from the acknowledgment, since it is a record from the acknowledgment, we humbly insist, it is from that time a recognizance, and to be paid as such.

But if an inrollment should be thought necessary, such inrollment, where no purchaser is concerned, is not confined to the life of the party, but as we conceive, may be done at any time.

Therefore, we pray, as to this recognizance, which appears to have been given before one of the Masters of this Court, that we may be, *even now*, at liberty to inroll it; and this we conceive most reasonable.

For it appears, in this case, that the security, which the lender stipulated to have for his money, was to be a recog-

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nizance; it appears, that the debtor agreed to give a recognizance for the security; it is plain, that in confidence of this, the money was actually lent; it is as plain, that the most worthy and material parts of this recognizance, I mean the acknowledgment and caption, are all of them perfected.

So that what remains to be done, is only by the ministerial officer to inroll it; and the creditor ought not to suffer for the neglect or omission of the officer.

[339] In equity, where there is the covenant, or agreement of the parties, if made on a full and valuable consideration, whether it be to mortgage, or convey lands, the Court will compel an execution. If I covenant, in consideration of money lent, to mortgage such lands for it, this, in equity, is a mortgage, and such a lien upon the land, as that if the covenantor die, the heir is bound by it, though not named; such a lien upon the land, as that, if the covenantor become a bankrupt, his land thus covenanted to be mortgaged, shall not be liable to the other creditors on the commission of bankruptcy. So that it is no objection, that the other creditors will be prejudiced by the inrollment of this recognizance, for the other creditors are as much prejudiced, in the case last put of the bankruptcy. (*z*)

If it were admitted, that the recognizance, for want of an inrollment, is an imperfect security, just as a mortgage, if made by way of feoffment, would be void for want of livery; yet, as in such case, where the security is made for a (*a*) full and valuable consideration, a Court of Equity would make it good, though against a mesne creditor by judgment; in the same manner will equity help this imperfect security, if it be imperfect for want of an inrollment; it being agreed on all sides, that the security should be a recognizance, and in confidence of this, the money actually advanced.

(*a*) Vide ante, 282. in the case of Finch v. Earl of Winchelsea.

And it is plain, when the recognizance is inrolled, (if that be requisite,) the inrollment shall relate to the acknowledgment, and make it perfect *ab initio*.

So that we humbly take it, the recognizance, though not inrolled, is a good recognizance, or if an inrollment be re-

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(*z*) See *Russell* v. *Russell*, 1 Bro. C.C. 269. *Ex parte Warner*, 1 Rose, 286. 19 Ves. 202. and cases there cited. *Ex parte Whitbread*, 1 Rose, 299. 19 Ves. 209. *Ex parte Meux*, 1 Gl. & J. 116. by which it is settled that an equitable mortgage may be created by a mere deposit of title deeds, and even extended to subsequent advances.

quisite, we are still at liberty to inroll it, and that it shall take place as a recognizance. BOTHOMLY v. LORD FAIRFAX.

On the other side it was alledged that without inrollment this recognizance was no record, nor could it be given in evidence as such; and though no precise time was fixed for the inrollment of it, it was, however, reasonable to follow the equity of the 13 Ed. I. cap. 4. which provides for the inrollment of statutes merchant and staple; and that, by the course of the petty-bag, (1) they never inrolled recognizances after six months, without a special order to do it *nunc pro tunc*. That in this case application had been made to the Master of the Rolls for leave to do so, who had refused; and particularly Sir *Joseph Jekyll* insisted, that this security ought to be deemed only as a debt by simple contract, and not as a bond, in regard it did not appear to have been delivered as a deed.

Lord Chancellor: There is a just suspicion upon the security, that this recognizance was otherwise satisfied or secured, it not having been all this while inrolled; and whenever the Court permits the inrolling of a recognizance, after the time elapsed, it always takes care not to hurt an intervening (*a*) purchaser; and as that may happen to be the case here, therefore *Philips* is to be looked upon as a bond-creditor only, the sealing and acknowledging thereof supplying the want of delivery (*z*)

(*a*) To this purpose see the case of Fothergill v. Kendrick, 2 Vern. 234.

(1) Vide Lord *Clarendon's* Orders, 148.

4. Myl. & Cr. 39.

(*z*) See *Glynn* v. *Thorpe*, 1 B. & A. 153.

1907. A.C. 141.

NORTHEY *versus* STRANGE.

CASE 90.

A Freeman of *London* has no wife, and has issue *A.* a son, and *B.* and *C.* daughters, *C.* marries against her father's consent, by which means she never had any portion; afterwards she dies in her father's life-time, leaving a son *D.*

Sir JOHN TREVOR, Master of the Rolls.

Pre. Cha. 470. 2 Eq. Ca. Ab. 264. pl. 8, 9. 331. pl. 4.

*The freeman makes his will, wherein, taking notice that he had given to his son *A.* 400*l.* and to his daughter *B.* 1000*l.* in full of their orphanage part by the custom, he devises 500*l.* to his grandson *D.* and, after some other legacies, gives one [*341]

NORTHEY *v.* STRANGE.

moiety of the surplus of his personal estate to his son *A.* the other moiety to his children and grandchildren.

Afterwards the freeman, in his life-time, gives several further sums, at several times, to his son, amounting to 600*l.* more, the certainty whereof does not appear under the freeman's hand, but does appear by the son's answer in the cause; and then the freeman dies, leaving his daughter *B.* ensient with a child which was afterwards born.

1*st*, It was admitted by the counsel on both sides, and decreed by the court, that there being no wife of the freeman, (*a*) the children were entitled to one moiety, the other moiety being the dead man's part.

(*a*) Salk. 426. 2 Vern. 612. Where a freeman of London leaves no wife, the children are entitled to one moiety, and the other moiety is the dead man's part.

Grandchildren of a freeman are not within the custom, to come in for an orphanage part.

(*b*) Salk. 426. 1 Vern. 397.

2*dly*, It was admitted by counsel, and said to have been so determined, and settled, that a freeman's grandchild (where the grandchild's father was never advanced in the freeman's life-time, and died before the freeman, leaving a child), (*b*) was not within the custom; and that only the freeman's children were within the custom, to come in for an orphanage part.

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Freeman's son has had several sums from the freeman, the certainty of which does appear; the son has had likewise several other sums, the certainty of which does not appear, otherwise than by the son's answer; the son not barred, but shall come in for his orphanage part. (*c*) 2 Vern. 630.

3*dly*, It was decreed that whereas the freeman's son *A.* was by the freeman's will mentioned to have had 400*l.* and consequently the *quantum* of *A.*'s advancement appeared under the freeman's hand, yet this (*c*) very declaration, by the custom, let the son in for his orphanage part; and though the son *A.* afterwards received farther sums amounting to 600*l.* from his father the freeman, and the certainty thereof appeared by his own answer, yet these sums which were additional gifts to his advancement, being with the other 400*l.* brought into hotch-pot, would not be a bar to his orphanage part (1)

One devises the surplus of his estate to his children and grandchildren; a grandchild in ventre sa mere at the testator's death shall not take: secus had it been to the children and grandchildren living at his death.

4*thly*, That the child of *B.* the freeman's daughter, who was in *ventre sa mere* at the freeman's death, should not take; in regard a devise to one's children and grandchildren should, *primâ facie*, refer only to such children and grandchildren, as were living at the time of the making (2) of the will; but if

(1) Vide *Blunden* v. *Barker*, post. 642.

(2) Vide *Heath* v. *Heath*, 2 Atk. 121. *Haughton* v. *Harrison*, ib. 329. *Maddison* v. *Andrew*, 1 Vez. 57. *Ellison* v. *Airey*, ib. 111. *Horsley* v. *Chaloner*, 2 Vez. 83. *Bartlet* v. *Hollister*, Amb. 334. *Isaac* v. *Isaac*,

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a devise were to my children and grandchildren *living at my death*, a child in *ventre sa mere* might, in such case, be so far regarded as to be looked upon as living. (1)

5thly, That the son *A.* should not come in for a share of the remaining surplus, he being, by the words of the will, separated from the other children, (*viz.*) the devise being of one moiety of the surplus to the testator's son *A.* and the other moiety to his children and grandchildren, so that the son *A.* was intended to have only a moiety.

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Children and grandchildren must take per capita.

* *6thly*, That the children and grandchildren must take *per capita*, and not *per stirpes;* they all taking in their own right, and not by way of representation. (2)

(*a*) 2 Vern. 207. 378. 611. & ante, 97. Lord Bindon v. Earl of Suffolk.

7thly, That a legacy of 500*l.* being given to *A.* and if *A.* died before twenty-one, then to *B.* upon *A.*'s dying before twenty-one in the life of the testator, this was not a lapsed legacy, (*a*) but should go over to *B.*

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ib. 348. *Baldwin* v. *Karver*, Cowp. 309. *Attorney General* v. *Crispin*, 1 Bro. C. C. 386. *Roberts* v. *Higman*, ib. 532. (note.) *Congreve* v. *Congreve*, ib. 530. *Devisme* v. *Mello*, ib. 537. *Singleton* v. *Gilbert*, ib. 542. (note). *Gilmore* v. *Severn*, ib. 582. *Ayton* v. *Ayton*, ib. 542. (*z*) (note). *Viner* v. *Francis*, 2 Bro. C. C. 658. *Hughes* v. *Hughes*, 3 Bro. C. C. 352. (*y*)

(1) Vide *Beale* v. *Beale*, ante 246. *Millar* v. *Turner*, 1 Vez. 85. *Bennet* v. *Honeywood*, Amb. 708. *Cooper* v. *Forbes*, 2 Bro. C. C. 63. *Clarke* v. *Blake*, ib. 320.

(2) Vide *Blackler* v. *Webb*, post. Vol. II. 383.

(*z*) 1 Cox, 327.

(*y*) *Middleton* v. *Messenger*, 5 Ves. 136. *Barrington* v. *Tristram*, 6 Ves. 345. *Paul* v. *Compton*, 8 Ves. 380. *Hughes* v. *Hughes*, 14 Ves. 256. *Campbell* v. *Prescott*, 15 Ves. 500. *Weld* v. *Bradbury*, 2 Vern. 705, note 2. *Leake* v. *Robinson*, 2 Mer. 363. *Laffer* v. *Edwards*, 3 Mad. 210. *Slade* v. *Milner*, 4 Mad. 144. *Legard* v. *Haworth*, 1 East, 120.

1. Young & C. 457. 1924. c. 11b
3. Myl. & Cra. 683. 1916. 1. Ch. 557.
7. Cin. s. 63.
25. Ch. D. 37 s.

ONIONS *versus* TYRER.

CASE 91.

LORD CHANCELLOR COWPER.

ONE by will duly executed and attested by three witnesses, who subscribed the same in the presence of the testator, devised lands to trustees, to several uses under which the plaintiff claimed.

2 Vern. 741. Pre. Cha. 459. Gilb. Rep. 130.

10 Mod. 467. 1 Eq. Ca. Ab. 407. pl. 1. In a will devising lands, three witnesses must subscribe in the presence of the testator.

ONIONS *v.* TYRER.

A will or writing, revoking a former will, must be subscribed by three witnesses, but this need not be in the presence of the testator.

He afterwards made another will of the same lands, devising them to other trustees, but to the (1) same uses, and there was a clause, in this last will, revoking all former wills, but in this last will, though subscribed by the testator, and attested by three witnesses, yet the witnesses did not subscribe their names in the presence of the testator.

Upon which the testator's heir at law laid claim to these lands; and the question was, whether this last will, which was admitted to be a void will *quoad* the lands in question, should yet be a good revocation of the former will?

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1*st*, The diversity betwixt the penning of the two clauses in the statute of frauds was observed; (*scil.*) the clause relating to the devise of lands (*a*) requires, that three witnesses must subscribe in the presence of the testator; but the clause of revoking former wills (*b*) says, that no will in writing of land shall be revoked, unless it be by some other will or codicil in writing, or writing declaring the same, signed in the (*c*) presence of three or more witnesses; so that this last clause does not direct that the writing, which revokes, should be subscribed by three witnesses in the testator's presence; but a will of land must be subscribed by three witnesses, and that in the testator's presence.

(*a*) Sect. 5.

(*b*) Sect. 6.

(*c*) Ante 11.

But then it was insisted, that this last will, notwithstanding the usual clause of revoking all former wills, should not revoke the first will; for that the revoking clause in the statute requires, that such revocation should be by a *will*, which (it was said) must be a *good* and *effectual* will of land, and this last will was not so; neither was it a good codicil, or so much as a writing declaring an intention of revocation; for that this writing, (supposing it to be a good will,) was yet so far from intending to revoke the former will, that it gave the land exactly to the same uses; now the revoking intended by this clause of the statute was such, as should be made purely with an intention to revoke or destroy a former will; and so it was held and resolved in the case of *Eccleston* v. *Speak*, in 3 Mod. 258. and Show. 89.

Lord Chancellor: (2) I do allow of the case of *Eccleston* v.

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(1) A mere change of trustees will not revoke a prior devise of the equitable estate. *Willet* v. *Sandford*, 1 Vez. 178. 186. *Doe* v. *Pott*, Doug. 710. *Watts* v. *Fullarton*, (cited) Doug. 718.

(2) "His lordship declared that if the "testator *Thomas Tyrer*, had by his "second will barely revoked the first, "without declaring by the same act his "intention to dispose of his lands to the "same purposes, to which they were "devised by the former will, the second "will had been a good revocation of "the former as to the lands devised;

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A void will or codicil, though there be a clause of revoking all former wills, will not however operate as a revocation.

Speak, in regard there the second will devised the lands to the same person to whom they had been devised by the first will; and therefore it may be truly said, that the second will did not intend to revoke the former, but rather to confirm it.

" but here is a disposition of the same " lands in the second will to the same " purposes as in the first will, which " shews he did not mean to revoke his " first will as to the devise of these " lands, unless he might by the second " will (at the same time that he revoked " the former) set up the like devise, so " as to take effect by virtue of his se- " cond will, and that his second will " never being so perfected as to make " the devise of the lands therein to be " good, the same devise stood unre- " voked by the former will; and that " upon the like reason the courts of law " had determined with great justice in " like manner in the cases now cited. " And it is plain the testator did not " mean to revoke his former will by " cancelling, but by substituting another " perfect will in lieu thereof, and not " otherwise, and therefore the cancelling " thereof (if any) was but a circumstance " shewing that he thought he had made a " good disposition by the second will, and " in confidence thereof it was done with " no other intent, but that the second " will should thereby most surely take " place. But here being a contrariety " of evidence, his lordship is of opinion " the better evidence is, that the will " was not cancelled by tearing it in the " presence of the testator, but if the " testator did order it to be cancelled, " the effect of such cancelling depend- " ed on the validity of the second will, " and ought to be taken as one act done " at the same time, so that if the second " will is not valid, as the testator thought " it was, and without which he would " not have cancelled the first, the can- " celling the first will, depending there- " on, ought to be looked upon as null " also, and therefore the first will as to " the said lands, is still subsisting and " unrevoked. And it would be unrea- " sonable and contrary to natural jus- " tice, that the testator, who by his " second will has shewn his intention to " dispose the same lands to the same " purposes as in his former, and thereby " in effect made the same devise twice, " should by that means be wholly de- " feated of having his meaning take " effect by either of them; and that " therefore if the first will was cancelled " as the law requires, it is one of those " accidents against which this court " ought to relieve. And upon the whole " matter his lordship declared the trust " of the term in the first will, ought to " be executed," &c. Reg. Lib. B. 1716. fol. 242. The law to be collected from the several cases upon this subject, seems to be this:—The title of the heir at law is not to be defeated, but by some other title certain and unexceptionable. Gilb. Devises, 115. And therefore where there is proof of the existence of a will, the contents of which do not appear, no conjecture shall be admitted as to the contents of such will, in prejudice of the heir. Cowp. 92. So, two inconsistent wills of the same date, neither of which can be proved to be last executed, (unless explained by some subsequent act of the testator), are void for uncertainty, and will let in the heir. *Phipps* v. *Earl of Anglesea*, 5 Bro. P. C. 45. On the other hand, wherever an *effective* devise appears to have been once made in disinherison of the heir at law, it shall lie upon the heir to prove that such devise has been as *effectively* defeated. *Harwood* v. *Goodright*, Cowp. 87. and 7 Bro. P. C. 344. (*z*) In the present case of *Onions* v. *Tyrer*, the first will was impeached in both the

(*z*) S. C. 3 Wils. 497.

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But suppose, in the latter will, in that case, there had been no devise of the same land to the same person, or if the latter will had only extended to the personal estate, and not to the lands in question, then the general clause of revoking all former wills, might have been a good revocation.

Cancelling a former will by mistake, or on a presumption that a latter will is good, which proves void, will not let in the heir.

But a second will devising lands to the same person as the former, and revoking all former wills, and this subscribed by three witnesses, but not in the testator's presence, shall never revoke the former will, so as to let in the heir; nay, if by the latter will the premisses in question had been given to a third person, it should never have let in the heir, in regard the

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ways, pointed out by the Statute of Frauds, namely, 1*st*, As being torn in the presence and by the direction of the testator (to which point some evidence was adduced, as appears by the report of this case in 2 Vern. 741. and also by the decree as above stated from the register's book) and 2*dly*, As being revoked by the second will. On the first head the act of cancelling was not sufficiently proved, but yet it is determined by this case as well as by *Hyde* v. *Hyde*, 3 Cha. Rep. 155. and *Burtenshaw* v. *Gilbert*, Cowp. 49. (which fully recognizes the principles of *Onions* v. *Tyrer*), that the cancelling is in itself an equivocal act, and in order to operate as a revocation, must be done *animo revocandi*. On the second head, with respect to revocation by subsequent devise, it is necessary that the second will should expressly revoke, or be clearly incompatible with, the first devise, *quoad the particular subject matter* of such devise, for no subsequent devise will revoke a prior one, unless it apply to the same *subject matter*. *Harwood* v. *Goodright*. It is also necessary, that the second will should be *subsisting* and *effective* at the time of the death of the testator. If therefore it be not executed according to the Statute of Frauds, it is not *effective*, and it is as if no second will had existed, as in *Hyde* v. *Hyde*, 3 Cha.Rep. 155. *Limbery* v. *Mason*, Com. Rep. 451. and in the present case of *Onions* v. *Tyrer*, (and yet a devise of lands *void* in respect of the *incapacity of the devisee* to take, shall revoke a former devise. *Roper* v. *Ratcliffe*, 1 Bro. P. C. 450. So shall a subsequent *grant* to a *person incapable* of taking. *Beard* v. *Beard*, 3 Atk. 72. (*y*) So, if the second will be effectually cancelled in the life-time of the testator, the first will shall operate as if no other had existed, for it is the only will *subsisting* at the testator's death. *Goodright* v. *Glazier*, 4 Burr. 2512. With respect to the difference of the penning of the two clauses of the statute as to wills and revocations, (which is observed in *Onions* v. *Tyrer*), it does not appear that any case has been determined expressly upon the subject either in affirmance of, or contradiction to what is said by lord *Cowper* in the decree as taken from the Register's book, all the questions having arisen upon instruments, which have not operated *merely* as revocations, but also as *substantive devises* in themselves. (*x*)

(*y*) But not a grant which becomes ineffective under Stat. 9 G. 2. c. 36. by the death of the grantor within 12 months. *Matthews* v. *Venables*, 2 Bing. 136. And see *Wright* v. *Littler*, 3 Burr. 1244. 1 Bla. Rep. 345.

(*x*) See note to *Duppa* v. *Mayo*, 1 Williams's Saund. 277. f. *Longford* v. *Eyre*, post. 740. *Ellis* v. *Smith*, 1 Ves. jun. 11. *Thomas* v. *Evans*, 2 East, 488. *Vawser* v. *Jeffery*, 2 Swan. 268.

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meaning of the second will was, to give to the second devisee, what it had taken from the first, without any consideration had to the heir, and if the second devisee took nothing, the first could have lost nothing; or if the first will had been cancelled by the testator's directions, upon a presumption, that the second devisee was to take the premisses by the second will, such a cancelling should not have profited the heir, because it would have been a cancelling proceeding from a mistake: it is no more, than if the testator, being sick, and having his two wills under his pillow, should, by mistake, give his last will to be cancelled, or order one to cancel his first, who, by mistake, cancels his last.

And so in the principal case, though the first will was ordered by the testator to be cancelled, and the same was in fact cancelled accordingly, yet all this being upon a presumption, that the latter will was good, and duly executed, it is properly relievable under the head of accident. Wherefore let the heir be enjoined, and the first devisee hold and enjoy.

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One makes duplicates of his will, and cancels one of the duplicates: this is a revocation of the whole will.

In this cause it was said by Sir *Thomas Powis*, and not denied by any, that if a man, having two duplicates of his will, cancels one of these duplicates with an intention to destroy his will; this is a good revocation of the whole will, and of both the duplicates; and that this was Sir *Edward Seymour*'s case. (1)

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(1) So *Burtenshaw* v. *Gilbert*, Cowp. 54. But it will depend upon the cancelling the duplicate being done *animo revocandi*, *Mason* v. *Limbery*, 4 Burr. 2515. and Com. Rep. 451. S. C. (*z*)

(*z*) As to cancelling, see *Larkins* v. *Larkins*, 3 Bos. & Pul. 16. *Short* v. *Smith*, 4 East, 419. *Perrott* v. *Perrott*, 14 East, 423. *Pemberton* v. *Pemberton*, 13 Ves. 310. *Utterson* v. *Utterson*, 3 V. & B. 122. Coop. 60. *Winsor* v. *Pratt*, 2 Brod. & B. 650. *Doe* v. *Perkes*, 3 B. & A. 489.

DE TERM. PASCHÆ, 1717.

CASE 92.

BAGOT *versus* OUGHTON.

LORD CHANCELLOR COWPER.

Fortesc. Rep. 332. Mod. Cas. 249. 381.

SIR *Edward Bagot* married the daughter and heir of Sir *Thomas Wagstaff*, and for raising part of Mrs. *Wagstaff's* portion, Sir *Thomas Wagstaff* mortgaged part of his estate for 3500*l.* and died, leaving Lady *Bagot* his daughter and heir.

A covenant to pay the mortgage money not suable in equity, unless covenantor receives the money; as where a feme sole, seised of lands subject to a mortgage, marries *B.* and the mortgage is assigned, and *B.* in the deed of assignment covenants to pay the money and dies, his personal estate not liable in equity to pay the mortgage money.

15. Jur. 1167.
3. Myl & Kee. 614.
1911. 1. Ch. 472.

The Lady *Bagot* afterwards joined with her husband Sir *Edward* in a deed and fine, whereby she settled her estate on her husband and herself and the heirs male of the body of her husband.

It happened that the mortgagee wanting his money, Sir *Edward* joined in an assignment of the mortgage, and covenanted that he, or his wife, or one of them, would pay the money.

Afterwards Sir *Edward Bagot* died, leaving Sir *Walter* his son by his said wife, and his lady intermarried with the defendant colonel *Oughton*, and died.

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And the question being, whether, by reason of the covenant from the said Sir *Edward Bagot*, for the payment of this 3500*l.* mortgage-money, Sir *Edward*'s personal estate should be liable to pay the same?

It was decreed (1) by Lord Chancellor, that this covenant by Sir *Edward* should not oblige his personal estate to go in ease of the mortgaged premisses; forasmuch as the debt being (*a*) originally Sir *Thomas Wagstaff*'s and continuing to be so, the covenant upon the transferring the mortgage was an additional security for the satisfaction only of the lender, and not intended to alter the nature of the debt.

(*a*) Vide Evelyn v. Evelyn, post. vol. II. 659. (2)

From hence, as it seems, it may be inferred, that if a feme sole makes a mortgage, and receives the money, and marries,

(1) Reg. Lib. A. 1716. fol. 438 (2) Et vide *Howell* v. *Price*, ante, 294. (note.)

and then the mortgage is transferred, the husband joining in the assignment, and covenanting to pay the money, the wife, or the heirs of the wife, upon the death of the husband, shall not compel an application of the husband's personal estate for the payment of the mortgage-money. *Secus* if the husband had received this money. (1)

BAGOT v. OUGHTON.

(1) Vide *Tate* v. *Austin*, ante 264. *Lewis* v. *Nangle*, Amb. 150. *Clinton* v. *Hooper*, 3 Bro. C. C. 201. (*z*)

(*z*) *Pitt* v. *Pitt*, 1 Tur. 180.

DEAN AND CHAPTER OF DUBLIN *versus* DOWGATT.

CASE 93.

THE Archdeacon of *Dublin* moved for a *mandamus* in the court of King's Bench in *Ireland*, to be directed to the Dean and Chapter of *Dublin*, commanding them to admit him to a stall in the cathedral church of *Dublin*, and to a vote in the chapter.

LORD CHANCELLOR COWPER.

1 Stra. 536. Whether error lies on a rule, or award of a mandamus.

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And upon that motion, and arguments thereon, the Court of *B. R.* there granted first a *mandamus*, then an *alias*, and at last a peremptory *mandamus*.

Afterwards the Dean and Chapter brought a writ of error issuing out of the Court of Chancery here, and returnable in the Court of *B. R.* at *Westminster*; and it was moved, in regard the King's Bench in *Ireland* had not made any return to the writ of error, that the Court of Chancery would order them to make their return, and in the mean time to stay all the proceedings upon the *mandamus*.

For which purpose it was insisted, 1*st*, that a writ of error was a writ of right, and the King's writ, and the only remedy that the subject had to be redressed, when wronged by the erroneous proceedings in an inferior court; as the court of King's Bench in *Ireland* was, with respect to the court of King's Bench in (*a*) *England*.

(*a*) Vide post, Vol. II. 262. Fryer v. Barnard.

2*dly*, That if a writ of error did not lie in this case, on account of it's not being a judgment, but only a rule upon a motion; yet the court of *B. R.* in *Ireland* ought to return this; like the case, where the statute of 21 Jac. 1. cap. 23. says, "that after issue joined, a *habeas corpus* shall not re-

DEAN, &c. OF DUBLIN v. DOWGATT.

(a) Carthew, 69. Watson v. Clark.

"move a cause out of an inferior court," still the inferior court ought to make their (a) return to the court from whence the *habeas corpus* issued, of the special matter, tho' they have liberty to proceed notwithstanding.

(b) 9 Annæ, cap. 20.

3*dly*, That upon a *mandamus*, since the statute relating to *mandamus's* (b), which allows special pleadings to it, it is plain error lies; but however, there ought to be a return to the writ.

[350] On the other side it was said, that it was very true, since the statute which allows special pleadings to a *mandamus*, error lay of a judgment thereon; because it is now in the nature of an action, and costs are given by the statute for that side which prevails.

But this is no argument that error lies of a *mandamus*, where there is no plea to it, and only a rule awarded for the *mandamus*, which is not in nature of a judgment.

That the late statute of *mandamus's* did not extend to *Ireland*; so that there could be no special pleadings, by way of replication to it, as now there may be in *England*.

That this was like a prohibition granted upon a motion, of which no writ of error lies; as was adjudged in the House of Lords in the Bishop of St. *David*'s case, who moved for a prohibition in the King's Bench to stay the proceeding in the Archbishop's court, in order to his deprivation, and the court of King's Bench denied it; and on that, the Bishop of St. *David*'s brought error in the House of Lords, who held it did (z) not lie; which was apprehended to be the same case. But if there was a declaration upon a prohibition, and a judgment given thereupon, in such case error would lie.

But it being said, the court of *B. R.* in *Ireland* were disposed to shew all obedience and respect to the court of Chancery, and only desired time to consider what to return, doubting whether this writ of error lay, and that they would submit, until they should make a return to the writ of error, to stay proceedings upon the *mandamus;* the Court gave them their own time.

[351] On this occasion *Parker* C. J. (who together with C. J. *King*, and C. B. *Bury* were desired by Lord Chancellor *Cowper* to assist at the motion), said, that the Court of Chancery might supersede this writ of error *quia improvidè emanavit*, if it were so.

(z) Salk. 136. 1 Ld. Ray. 545.

DEAN, &c. OF DUBLIN v. DOWGATT.

Also he said, that a *mandamus*, since the late statute, was in the nature of an action, special replications, and pleadings therein being admitted, and costs given to either side that prevailed:

Writ of error of a judgment on a mandamus, no supersedeas to a peremptory mandamus.

And that a case had happened in the King's Bench where judgment was given upon special pleadings upon the late statute, for the *mandamus*, and the defendant brought error, and it was admitted error lay; yet this was held to be no *supersedeas* to the peremptory *mandamus*; for that such a construction would quite defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the *mandamus*.

And *King* C. J. took notice, that the words of the statute were, that in case judgment were given for the *mandamus*, a (*a*) peremptory *mandamus* should be granted without delay. (1)

(*a*) Vide sect. 2.

(1) Upon return being made to the writ of error, it was afterwards determined in the court of K. B. and affirmed upon appeal to the House of Lords "That no writ of error will lie upon "award of a peremptory *mandamus*." 2 Bro. P. C. 554. (*z*)

(*z*) So *Rex* v. *Hearle*, 1 Stra. 625. But see *Kynaston* v. *Mayor of Shrewsbury*, 2 Stra. 1051. *Regina* v. *Paty*, Salk. 504.

DE TERM. S. TRINITATIS, 1717. [352]

VANE *versus* FLETCHER.

CASE 94.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 231. pl. 9. 477, pl. I.

SIR *Henry Fletcher*, having a considerable estate in fee-simple in *Cumberland*, and being converted to the Popish religion, conveyed his estate by settlement to trustees in fee, in trust that he should have a rent-charge thereout for his life, and then in trust to secure his sisters' portions; and afterwards to the use of *Henry Fletcher*, a remote relation and a papist, for ninety-nine years, if he should so long live; remainder to the trustees and their heirs during the life of

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the said *Henry Fletcher*, to preserve contingent remainders, remainder to his first and other son in tail male; and for want of such issue, to Sir *Henry*'s nephew *Richard Vane* for his life, and so to his first, &c. son in tail male, upon condition to change his name from *Vane* to *Fletcher*, with remainders over.

Sir *Henry Fletcher* died without issue, and *Henry Fletcher* the papist had no issue, and *Richard Vane* the remainder-man, together with the sisters and heirs at law of Sir *Henry Fletcher*, brought their several bills, setting forth, that *Henry*
[353] *Fletcher*, being a papist, was by the act of the 11 & 12 W. 3. cap. 4. sect. 4. disabled to take any real estate, or any trust thereout; wherefore their respective bills prayed, that the respective plaintiffs should be let into the possession of the premisses.

Lord Chancellor at first inclined to direct an issue to try, whether *Henry Fletcher* was a papist at the time that this remainder should have vested in him; and this was desired by the plaintiffs; but in regard the act of parliament inflicted a forfeiture and disability (for which reason it was to be taken strictly), and the said *Henry Fletcher* being above eighteen years of age at the time of the making of the settlement, and so not within the clause of retrieving the estate, by returning to the protestant religion (which probably was (*a*) intended by the parliament), his Lordship would not assist the plaintiffs so far, as to direct an issue (1) to try, whether the said *Henry Fletcher* was a papist, at the time when the settlement was made; but left the heir at law, and the remainder-man, to go on and try their ejectments upon several demises; and directed, that none of the trust-terms, or estates in the settlement, previous to the said estate limited to *Henry Fletcher* the papist, or mesne betwixt the papist and Mr. *Vane* the remainder-man, should be given in evidence, or insisted upon; to the intent it might be tried, whether *Henry Fletcher*, who was strongly affirmed to be a papist (but had on the other side controverted it), was capable of taking or not; and who had the title, in case *Henry Fletcher* the papist was not capable of taking; the remainder-man insisting, that the limitations to the papist being void, therefore *he* was to take (2)

Equity not to assist any one to take advantage of a forfeiture.

(*a*) Vide post, Vol. II. 6. Hill v. Filkin, and Lord Macclesfield's opinion therein.

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(1) Vide *Stephens's Hospital* v. *Swan*, 5 Bro. P. C. 454. *Hobson* v. *Meade*, 6 Bro. P. C. 197. *O'Grady* v. *Lord Kinsale*, 6 Bro. P. C. 284.

(2) Vide *Carrick* v. *Errington*, post. Vol. II. 362.

presently; and the heir insisting, that the remainder-man was not to take until *Fletcher* the papist should be dead without issue; and that in the mean time the estate should descend to the heir, as undisposed of by the person that made the settlement.

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It is remarkable, that the clause of the statute of 11 & 12 W. 3. made to prevent the growth of popery, which says, "The next of kin that is a protestant, shall enter and enjoy "the lands during the life of the papist, or until he shall con-"form," extends only to the case, where the papist is under eighteen at the time that any lands come to him; but where the papist is above eighteen when the lands come to him, or in trust for him, such papist is utterly disabled to take, and the estate void; so that in the principal case, *Henry Fletcher* the papist being above eighteen at the time when the limitation was made to him, his next of kin made no pretension to the estate in question.

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By the statute against the growth of popery, papist under eighteen disabled to take only till conformity; if above eighteen, disabled for ever.

Also in this case, there were certain customary or copyhold lands, held of the borough of *Cockermouth*, which the said Sir *Henry Fletcher* was seised of, and which could not pass, but by surrender.

Voluntary conveyance of a copyhold, or other estate, not helped in equity against the heir.

And on behalf of *Henry Fletcher*, it was said, that Sir *Henry* had done all that lay in his power to surrender them, for he had made a letter of attorney to *J. S.* to surrender the premisses, and the steward or tenants refused to accept them, insisting that they ought to keep the letter of attorney; upon which they broke off, and no surrender was made. But

Lord Chancellor thought this a lucky accident in favour of the heir, which equity ought not to deprive him of, any more, than if the copyholder and the lord had disagreed about a fine which had prevented a surrender; and that this being a voluntary conveyance was not to be assisted in equity, like the case of a conveyance, to a wife (1) or child. But if the heir at law had himself done any thing to have prevented the acceptance of the surrender, that had been material.

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Besides, after all, it did not appear in this case, that Sir *H. Fletcher* had done all in his power for the making the surrender; for which reason the title to the copyhold premisses was declared by the court to be in the heir.

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(1) Vide *Watts* v. *Bullas*, ante 60.

1916.2 Ch. 423.

CASE 95.

POOLEY *et al' versus* RAY.

2 Eq. Ca. Ab. 452. pl. 5. 698. pl. 1.
A mortgage comes to an executor, who receives the mortgage money, and pays it away to his testator's creditors; afterwards it appears that the mortgage had been satisfied in the testator's lifetime; the executor must refund, tho' he had before paid the money away in debts, which he had not otherwise assets to pay.

SIR *John Cordell*, seised in fee of a considerable estate in *Suffolk*, was indebted to *Clement Ray*, the steward of his courts, and who was an attorney at law, in 400*l.* by mortgage dated the 1 *Jan.* 1701, taken in the name of *William Taylor*; and afterwards Sir *John Cordell* in *May* 1704, died without issue, leaving his two sisters, *Elizabeth King*, and *Margaret Firebrass*, his heirs at law.

Elizabeth King died leaving an infant son, now one of the plaintiffs, but by her will devised her moiety of the estate to two trustees, the plaintiff *Pooley* and one *Golding*, in fee, in trust to join with the other sister *Margaret* to raise by sale, mortgage, &c. of so much of the estate as was necessary, monies, sufficient for the payment of her brother's (Sir *John*'s) debts.

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1. Young 42. 25.

The creditors of Sir *John Cordell* brought a bill against the trustees *Pooley* and *Golding*, to have a sale for payment of their debts.

And on hearing of the cause, the—of the late Queen, an account was decreed to be taken of Sir *John*'s personal estate; and if that should not be sufficient to pay the debts, then the trustees were to join in a sale or mortgage to raise what money was requisite, and all the other creditors of Sir *John Cordell* were to come in before the Master, to prove their debts.

In *April* 1709, *Clement Ray* the mortgagee died, leaving his brother the defendant *Isaac Ray* executor, who coming before the Master, and not admitting any of his mortgage-money to be paid, proved the execution of the deed, and so got a report for his whole principal and interest as due; which report was afterwards confirmed and made absolute; and the money amounting to 700*l.* was, all of it, on the third of *November* 1711, paid by the trustees.

Afterwards it appeared by a copy of an account, under *Clement Ray*'s own hand, that 353*l.* 13*s.* 1*d.* had been paid by Sir *John Cordell* in his life-time.

Upon this, the trustees and infant bring a bill to be relieved against this over-payment. The defendant pleaded the former

decree, report, and proceedings; but, it being the case of an infant, the plea was over-ruled. (*z*) POOLEY *v.* RAY.

Then the defendant answered and insisted, that before any notice of the plaintiff's demand on account of this over-payment, the defendant, as executor of *Ray*, had paid away this 700*l.* in the debts of his testator.

Master of the Rolls: Let the Master see, whether there has been a double payment; and as to so much as has been overpaid, it must be allowed to the plaintiffs, and paid back by the executor of *Ray;* and the executor to be at liberty to sue such creditors, as through mistake he has paid, to make them refund. [357]

And there being an appeal from this decree to the Lord Chancellor *Cowper,* his Lordship (1) affirmed the decree, declaring that tho' this might be a hard case, yet if the plaintiffs had a right to be repaid their money, which they had overpaid on the mortgage, this right could not be overthrown by the defendant the executor's applying the money in any manner he should think fit; any more, than if an executor at law should recover a debt, and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error; the executor must restore the money to the plaintiff in error; and his having paid it away in debts of his testator, will not excuse him from paying it back.

So in the same manner, if there were a decree for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts; and then the defendant, against whom the executor had recovered the decree, brings an appeal, and reverses the decree; the plaintiff in the appeal shall be restored to the money. 2. Ves. 583.

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(1) Reg. Lib. B. 1716. fo. 419. "His Lordship was of opinion, that "although the defendant *Ray's* payment of 700*l.* amongst his brother's "creditors, be an accident which falls "hard upon him, yet it is impossible "for the plaintiff to make them parties. "And there being an evident mistake in "the former account, there ought to "be a refunding by the defendant *Ray*, "of what he has been overpaid, altho' "he hath applied the same in satisfaction of his brother's debts, and the "rather for that it is doubtful whether "he did not know how the accounts "stood between his brother the testator, "and Sir *John Cordell*, before such application made, and doth therefore order the said decree to be confirmed," &c.

(*z*) See *Carew* v. *Johnston*, 2 Sch. & L. 292. *Savage* v. *Carroll*, 1 Ba. & Be. 548. *Richmond* v. *Tayleur*, post. 734.

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Secus if the defendant had delayed the appeal, and willingly stood by, whilst the executor paid away this money to the testator's creditors; for this would be drawing the executor into a snare; but nothing of this kind appearing in the present case, affirm the decree.

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CASE 96.

BASSET *versus* CLAPHAM.

Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 748. pl. 1. Trustees to preserve contingent remainders in a voluntary settlement, decreed to join in a sale for payment of debts.

ONE after marriage makes a voluntary settlement of his lands to himself for life, remainder to trustees to support contingent remainders, remainder to his first, &c. son in tail successively, remainder to himself in fee; and contracting debts, he afterwards makes a conveyance of his estate to other trustees for payment of these debts.

The creditors bring a bill, and (*int' al'*) insist, that the trustees for preserving contingent remainders should join in the sale to destroy the contingent remainders; and this came on by consent before Sir *Joseph Jekyll*, who took time to consider of it, alledging, that though in the case of Sir *Thomas* (1) *Tipping*, where trustees had joined in cutting off remainders created by a voluntary settlement, the court, on a bill brought by a remote relation, had *refused to punish* them, as distinguishing betwixt a voluntary settlement, and one made on a valuable consideration; yet he had not known a precedent where the court ever *decreed* the trustees to join in destroying the contingent remainders; this being the (*a*) reverse of the purpose for which they were at first instituted.

(*a*) Ante, 129. Pye v. Gorge. Post. Else v. Osboro, 388. & Mansell v. Mansell, post, Vol. II. 678.

But this cause coming on in *August* 1717, and a precedent being shewn, where such a decree was pronounced, his Honour decreed, that the trustees should join to destroy (2) the

(1) *Tipping* v. *Pigot*, 1 Eq. Ca. Ab. 385. pl. 2. and Gilb. Rep. 34. S. C.

(2) Reg. Lib. A. 1716. fo. 460. There are some few instances in which the court has exercised its discretion by directing trustees to join in destroying contingent remainders, as in *Frewin* v. *Charlton*, 1 Eq. Ca. Ab. 386. pl. 4. *Winnington* v. *Foley*, post. 536. But this is done with great caution. *Townsend* v. *Lawton*, post. Vol. II. 379. *Symance* v. *Tattam*, 1 Atk. 613. *Woodhouse* v. *Hoskins*, 3 Atk. 22. *Barnard* v. *Large*, 1 Bro. C. C. 534. And it seems unsafe in any case for a trustee so to do without the directions of a court of equity. Vide *Mansell* v. *Mansell*, post. Vol. II. 678. (*z*)

(*z*) *Moody* v. *Walters*, 16 Ves. 283. *Biscoe* v. *Perkins*, 1 V. & B. 485; and see *Brown* v. *Carter*, 5 Ves. 862.

contingent remainders, and be indemnified, it being at the suit of creditors, and for raising of money for the payment of debts. BASSET v. CLAPHAM.

Note; Sir *Thomas Tipping*'s case was, where upon a marriage, a settlement was made by a third person, to the use of the husband for ninety-nine years, remainder to trustees during the life of the husband, to support contingent remainders, remainder to the wife for life, remainder to the first, &c. son of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband; there was no issue of the marriage, and the remainder in fee being contingent, in regard the limitation to the husband was for years only, and the estate not moving from the husband, (for if it had, the remainder limited to the right heirs of the husband would have been the old reversion,) the trustees joined to destroy this contingent remainder. [359]

And on this case being cited, it was said by the Master of the Rolls, that if a son had been afterwards born, it would have been a breach of the trust; but this remainder to the right heirs of the husband, being a remote limitation, and not within the consideration of the settlement, and voluntary, equity would not punish it as a breach of trust.

2. Eq. 104.
2. ch. 141.

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HAYTER, *Heir of* AMBROSE PILE, Plaintiff; CASE 97.
ROD,..... Defendant.

(Argument for the Plaintiff Hayter a Pauper.) At the Rolls.

AMBROSE Pile had a wife *Margaret*, and being seised in fee of an estate in *Herefordshire*, by his indenture of demise dated 20 *August* 1670, demises the premisses to a trustee (*William Abrahall*) his executors and administrators for ninety-nine years, in trust for himself and his wife *Margaret* for their lives and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, then in trust for the heirs of the body of *Ambrose Pile* the husband; and in default of such issue, in trust for the heirs of the survivor of the husband and wife.

2 Eq. Ca. Ab. 701. pl. 2. *A.* seised in fee, demises to *B.* his executors, &c. for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, then in trust for the heirs of the body of the husband; and in default of such issue, in trust for the heirs of the survivor of the husband and wife. Husband and wife have issue a son, and the husband dies, and then the son dies in the life of the mother without issue; the mother administers to her husband and son, and assigns this term to the defendant. Decreed her assignee well intitled, and that the term should not go to the heir of the husband as attendant on the reversion.

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The husband and wife have issue one son *James Pile;* the husband *Ambrose Pile* dies; afterwards

The son *James Pile* dies in the life of the mother, being an infant, and without issue.

Margaret Pile the mother, having administered, as well to her husband, as to her son, assigns this term of ninety-nine years to the defendant *Rod;* whereupon,

[361] The question is, who is intitled to the trust of this term? Whether it is attendant on the reversion, and consequently belongs to the plaintiff, who is heir at law of this *Ambrose Pile,* and is intitled to the reversion in fee expectant on this term; or whether the defendant *Rod* be intitled thereto, as assignee of *Margaret* the wife, who appears to have administered as well to her husband, as her son?

And, I take it, the plaintiff as heir at law of this *Ambrose Pile,* as he is intitled to the reversion, so is he intitled to the trust of the term, and that this term, in equity, is attendant on the reversion.

In speaking to this matter, I would beg leave to consider,

1*st.* That this is not a term in *gross,* but a term created *de novo,* created by him, who, at the same time, had the inheritance, and consequently distinguishable in law from the former.

2*dly,* That equity favours that construction, by which terms are looked upon as attendant on the inheritance.

3*dly,* That in this case, the trusts declared touching this term (excepting such trusts only as are void) are all determined; and that therefore this term shall attend the inheritance.

4*thly,* That in this case, the words appointing the remainder to the heirs of the body of the husband and wife are good words of purchase, and not of limitation, it being in case of a trust of a term.

[362] And, in the last place, I shall mention some cases which, in my apprehension, come up to the principal case, and in which terms have been decreed to attend the inheritance.

1*st,* Then I would observe, that the law itself distinguishes betwixt a term created *de novo,* and a term in *gross.*

In 10 Co. 87. (*Leonard Lovie*'s case,) and 1 Rol. Abridg. 831. pla. 2. it is adjudged, that if one seised in fee of land, devises it to *J. S.* and the heirs male of his body for 500 years, tho' this term shall go to the executors and administrators of *J. S.* and not descend to the heirs male of the body of *J. S.* yet when *J. S.* the devisee of the term dies without issue

male, the term shall cease, for the benefit of the testator's heir at law. HAYTER v. ROD.

But the law is plainly otherwise in case of a devise of a term in *gross*; and therefore, in 1 Rol. Abridg. 831. pla. 1. *Leventhorp* and *Ashbey*, where *A.* possessed of a term of 500 years, devises it to *B.* and the heirs male of his body, here, though *B.* the devisee dies without heirs male of his body, yet the term shall continue in *B.*'s executors, and shall not revert for the benefit of the testator's executors, as in the former case, it will cease for the benefit of the heir. So that it is plain, even the law distinguishes betwixt a term created *de novo* out of an inheritance, (which is the present case) and a term in *gross*.

I must admit, that in the principal case, the term itself for ninety-nine years is not determined, but is now in being, it being an absolute term at the time of its creation.

But what I rely upon is, that though the term itself is not determined, yet all the trusts declared touching it, are at an end; and that therefore the term shall, in equity, attend the inheritance (*z*), which is the same thing, with regard to the equitable consideration of it, as if the term itself were determined, and consequently that it belongs to the plaintiff who has the inheritance. [363]

In the next place I would take notice, that equity favours the construction, whereby terms for years are looked upon as attendant on the inheritance.

The creating of these long terms is a dismembering of the inheritance, and a creating of fractions of estates; but when equity construes the term to be attending upon the inheritance, this is again uniting the term to the reversion, and restoring it to the inheritance, from whence it was before taken. And restitutions are always favoured at law as well as in equity.

Besides, construing a term to attend the inheritance, is an interpretation in favour of the heir at law; and an heir both in law and equity, is preferred to an executor, or administrator; an heir must be of the blood of the ancestor from whom he claims to inherit; nay, he must be of the whole blood, for being of the half blood will not serve his turn; but an executor, or administrator, may not be of the blood at all, but may chance to be a mere stranger.

(*z*) See *Maundrell* v. *Maundrell*, 10 Ves. 259. 352. Coop. 206. *Doe* v. *Hilder*, 2 B. & A. 782. *Sidney* v. *Shelley*, 19 Ves.

HAYTER v. ROD. An heir is preferred to an executor.

I shall only cite one case in law, and one in equity, in relation to this matter, *viz.* that an heir is preferred to an executor.

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* In 3 Levinz, 47. *Holt* v. the *Bishop* of *Winchester*, there is this case: An incumbent of a church purchases the inheritance of the advowson and dies, and the dispute being betwixt the heir and executor, who should present to the church?

It was objected for the executor, that the advowson did not descend to the heir, until *after* the death of the incumbent; whereas *by* the death of the ancestor the church became void, and by this means the avoidance was severed from the inheritance, and vested in the executor, as a flower fallen.

But adjudged, in favour of the heir, that all was but as one instant, and where those two titles concur in one instant, the heir shall be preferred, as claiming under the elder right.

And as the law prefers an heir to an executor, even where there is a concurrence of right, so *æquitas sequitur legem*, as every day's experience shews, that an heir should compel the personal estate out of the executor's or administrator's hands, in aid of the real estate, to exonerate and clear the latter; which is a plain proof, that the heir, in equity, is (*a*) more favoured than the executor, or administrator.

(*a*) Vide ante, 174. Lingen v. Sowray, & post. 483. Chaplin v. Horner.

But in the next place (and what I pretty much insist on) it is to be observed, that the trusts declared concerning this term of ninety years (such of them I mean as are not merely void) are all determined, and consequently, when the trusts declared concerning this term are all determined, the term shall attend the inheritance.

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It will, I presume, be admitted, that if I am seised in fee, and make a lease for ninety-nine years, without any consideration, and continue in possession, and declare no trust concerning the term, this lease will be in trust for me and my heirs, a trust attending upon the reversion and inheritance.

And if this be so, where a long term is created, and no trust declared, it brings me somewhat nearer the principal case, (*viz.*) If a man seised in fee, creates a term for ninety-nine years, and declares *some* trusts of the term, (*viz.*) in trust for himself for life, and afterwards in trust for his wife for life, and there stops without declaring any further trusts; it seems plain, and has been resolved, in equity, that after the trusts that are declared, shall be expired, the term shall, from thenceforth, be attendant on the inheritance.

This brings me to the very case now before the Court, (*viz.*) that where a man is seised in fee, and creates a term for

ninety-nine years, in trust for himself for life, and afterwards to his wife for life, and afterwards upon several other trusts, that are apparently void; these void trusts are as no trusts, and it is the same thing as if after the trust limited to the husband and wife for their lives, no trusts at all had been declared; for declaring a void trust, is declaring no trust.

Then I say, that in the principal case all the trusts declared by this deed, expectant upon the death of the husband and wife, are void, either by accident, or else they were originally void even in their creation; and for this purpose I must beg leave just to repeat them.—The husband, who created this term of ninety-nine years, declares the trust thereof to be to [366] himself and his wife, for their lives and the life of the survivor; this is good; and after the death of the survivor, then in trust for the heirs of the bodies of the husband and wife.

Now this was a contingent trust, and would have been good, if there had happened to be such a person, as was heir of both the bodies of husband and wife: but then it must have been such an issue of both their bodies, as should have survived them both, for *nemo est hæres viventis;* but *James Pile,* the only issue of the marriage, dying after the father, and in the life-time of the mother, he could not take as heir of both their bodies, and therefore this limitation, which might by *possibility* have been good, became by *accident,* void.

The next limitation is in default of such issue, (*viz.*) in default of issue of the bodies of the husband and wife, then in trust for the heirs of the body of the husband *Ambrose Pile;* but this is a void limitation; because it is a limitation of a trust of a term, after a failure of issue of the bodies of the husband and wife.

That a limitation over of a trust of a term, after a failure of issue, is (1) void, is a *principle* in law.

An estate-tail is such an estate, as, in notion of law, may endure for ever; for which reason at common law, before the statute *de donis,* if a man gave or devised lands to another, and the heirs of his body, the donor could limit no remainder over; the donor himself had but a (*a*) possibility, which he could not limit over; much less can a trust of a term bear such a limitation. [367]

(*a*) 1 Inst. 22. & ante, 74.

This was admitted in the Duke of (*b*) *Norfolk*'s case, and in Pollexfen's Reports, from *fol.* 24 to *fol.* 44. there are thir-

(*b*) Vide Cases in Chancery, part 3.

(1) Vide *Target* v. *Gaunt,* post. 432.

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teen solemn resolutions, most of them with the assistance of the judges, and many of them stronger than the principal case, and in all of which it is solemnly decreed, that a limitation of a term, after a failure of issue, is void.

The next limitation is, to the heirs of the survivor of the husband and wife, (*viz.*) *Ambrose Pile* and *Margaret* his wife.

But this limitation of the trust of the term is still more plainly void, it being expectant on the determination of two estates-tail; this is one remote possibility upon another, and therefore clearly void, so as to have no appearance of a doubt.

From whence it is evident, that all the trusts declared concerning this term are determined.

1*st*, The trusts for the husband and wife for their lives, are determined by their death.

The next limitation to the heirs of their two bodies was contingent, and proved to be void, because there happened to be no heir of both their bodies.

The subsequent limitations were always and originally void, they being expectant on a failure of issue, and consequently there being no trust subsisting that was declared touching this term, the same shall attend the inheritance out of which it was *de novo* created.

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(*a*) 1 Vent. 334. 2 Vent. 311.

As to what the Court was pleased to object, that since the cases of (*a*) *Burchet* and *Durdant*, and that of *Specot*, in the House of Lords, it was become matter of doubt, whether the words [heirs of the bodies of the husband and wife] should be taken in that strict sense, so as to require the husband and wife to be both dead, before there could be an heir of their bodies; I take it, neither of those cases come up to this: in *Burchet* and *Durdant*'s case, the devise was to the heirs of the body of *J. S.* now living, which words [now living] described the person, and shewed the testator to have meant no more, than an heir apparent; but in the principal case, there are no such words as [now living], nor any words tantamount.

(*a*) Ante, 229.

As to the case of *Specot*, (oftner called (*a*) *Long* and *Beaumont*,) where a devise was (after several other precedent limitations), to *A.* for ninety-nine years, if he should so long live, remainder to the first and every other son of *A.* in tail male, remainder to the heirs male of the body of his (the testator's) aunt *Eliz. Long* lawfully begotten; and in default of such issue, to his own right heirs; the testator by the same will

taking notice, that his aunt *Elizabeth Long* was living, and giving her a legacy; where the Court of Exchequer (except Baron *Bury*) held the eldest son of *Elizabeth Long* should take: HAYTER *v.* ROD.

This judgment was reversed in *Cam' Scacc'*, and that reversal reversed in the House of Lords; but the reasons of the judgment which prevailed seemed to be, for that tho' the lands were devised to the heirs male of the body of *Elizabeth Long* lawfully begotten, yet the will took notice, that *Elizabeth Long* was at that time living, and in default of such issue of *Elizabeth Long*, the remainder was to go to the testator's right heirs.

As to the objection which the Court made, that the person creating this term *de novo*, had as absolute a power over the trust of the term, as over the term itself, and might sever it from the inheritance, and give it to the wife; that must be admitted; but then it must be by proper words, such as are not here; the trust of the term might, without doubt, have been limited to the husband and wife, and the survivor, and the executors and administrators of the survivor; or to the husband and wife, and to the executors and administrators of the wife; but, in this case, nothing is limited to the heirs of the survivor (who was the wife), but in default of issue of the marriage, and also in default of issue of the body of the husband; and this limitation is void. [369]

The next thing I would beg leave to consider is, whether, when a trust of a term is limited to the husband and wife for their lives, remainder to the heirs of their two bodies, the words [heirs of their two bodies] are words of *limitation*, and so void in case of a trust of a term; or whether they are not good by way of *descriptio personæ*. (1)

And I apprehend, that the heir of their bodies shall take by way of *descriptio personæ*.

I admit the case of *Peacock* and *Spooner* (*a*) was, that the father possessed of a term assigned it over to trustees, in trust for his son for life, remainder to his son's wife for life, remainder in trust for the heirs of the body of the son's wife by the son; this case came on first before Lord Chan- (*a*) 2 Vern. 43.

(1) Vide *Webb* v. *Webb*, ante 132. (*z*)

(*z*) *Hodgeson* v. *Bussey*, 2 Atk. 89.

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cellor *Jeffereys*, and he decreed the remainder to the heirs of the body to be void, and that the whole vested in the wife, which should therefore go to her executors or administrators.

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Afterwards it came before the Lords (*a*) Commissioners, and they reversed the Lord *Jeffereys*'s decree; it went at last into the House of Lords, who affirmed the decree of reversal, and held the remainder limited in trust for the heirs of the body of the wife, to be good, by way of decription of the person.

(*a*) 2 Vern. 195.

But I apprehend, the reason of that resolution was, not, as was hinted by the Court, for that this was within the equity of the statute of H. 7. made against jointresses discontinuing, or barring estates limited to them *ex provisione viri*, or of his ancestors:

For surely, the statute of H. 7. extends only to freehold estates; it was made to prevent the jointress from discontinuing the estate settled upon her, or to the remainders limited thereupon; but a tenant for years could not make any discontinuance. The statute of H. 7. was made to prevent jointresses from levying fines, or suffering common recoveries for the barring of the issue, or the remainder; but a tenant for years could never levy a fine, or suffer a common recovery, and therefore a term for years could not be within that statute. And tho' this case of *Peacock* and *Spooner* was so much agitated, and so often spoke to, by the greatest counsel of that age, yet none of them, according to the account I have of the case, ever made use of it as an argument to support the remainder limited to the heirs of the body of the wife by the husband, that this was good within the equity of the statute of H. 7.

But the substantial reason seemed to be, that where the trust of a term is limited to the husband and wife for their

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lives, remainder in trust for the heirs of the body of the wife by the husband, this is good by way of *descriptio personæ;* and the same thing, as if the trust of the term, after the death of the husband and wife, had been limited to such person as should be the heir of the body of the wife, by the husband.

If the remainder had been so limited, and in these words, it would surely have been good; and it being in case of a trust, where the intention of the parties is regarded, equity will construe it, as if the limitation had been expressed in such words.

(*b*) 1 Inst. 22. b. 319. b. 1 Rep. 104. Shelly's Case; post, 399. Goodright v. Wright; and Attorney General v. Sutton, 757.

I admit, in case of a freehold (*b*) estate the rule is, that if the estate be limited to the ancestor for his life, with an im-

mediate, or mediate remainder to the heirs of the body of the tenant for life, these are words of limitation.

But in that very case put, if the first limitation be to the ancestor for ninety-nine years, if he so long live, remainder to trustees during his life, remainder to the heirs of his body; now these words are not words of limitation, but of purchase; and this is more like the principal case.

Besides, in the case of limitation of a trust of a term to *A.* for life, remainder to the heirs of his body, in regard a term, or trust of a term, cannot descend to the heirs of his body, the words [heirs of his body] are as foreign, and as far from being words of limitation as if the remainder of the trust of the term had been limited to the heirs of the body of any *stranger*, or third person, and that surely had been good,

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Subsequent to the case of *Peacock* and *Spooner*, *viz.* in *Trin. Term*, 1699, in Lord *Sommers*'s time there was the case of *Dafforne* v. *Goodman* (*a*), where one *Bolt*, possessed of a term of ninety-nine years, assigned it in trust for himself for life, remainder, as to one moiety, in trust for his wife for life, remainder, as to that moiety in trust for the heirs of the body of the wife by him begotten: the husband died leaving issue, and then the wife died, and the question being betwixt the heir of the body and the administrator of the wife, Lord Chancellor *Sommers* decreed in favour of the heir of the body of the wife, and that this remainder was a good description of the person; and observed, that the decree of *Peacock* and *Spooner* in the House of Lords had settled this point.

(*a*) 2 Vern. 362. Pre. Cha. 96.

I must agree, that after this, in the case of *Webb* and *Webb* (*b*) where a trust of a term was limited to the husband for life, remainder to the wife for life, remainder to the heirs of the bodies of the husband and wife, this point came before Sir *John Trevor*, Master of the Rolls, where it was decreed to be a good limitation; after which it came before Lord *Harcourt*, who held it an ill one; and then the distinction was first made, that if the limitation of the remainder had been to the heirs of the body of the wife, according to *Peacock* and *Spooner*'s case, it had been good within the equity of the statute of H. 7. but before, or since that time, I never heard of that distinction; and as to the weight thereof, I submit it to the Court on what I have said.

(*b*) 2 Vern. 668. Ante, 132.

And now, admitting for argument-sake, that the trust of this term created *de novo* by the husband that had the fee, had been by way of words of limitation, to the husband and wife, and to the heirs of the body of the husband by the wife:

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I submit it whether, even in this case, if the inheritance descends to the heirs of the body, the term will not attend upon it.

And if once attendant on the inheritance, it must be always so.

The intent of the party appears to be, that the trust of the term should descend; and it is not a naked term, but there is an inheritance which may support the descent of it: there is, I believe, no resolution against it, and therefore I take it that in favour of the heir, the trust of the term shall rather go with the inheritance to the heirs of the body of the husband, than part from the inheritance and go to the executors and administrators of the husband, and leave a worthless inheritance expectant on a long term, to descend to the heir.

It is more reasonable to say that, in such case, where the same man has the inheritance, and the trust of the term for years, the term for years shall give way to the inheritance; and so in fact it was said by my Lord *Cowper*, in the case of *Best* and *Stamford*, which I shall cite presently.

And now in the last place, as to the cases on this head, they are many, and some of them (as I take it) stronger than the principal case.

If a man seised in fee of lands, raises a term for payment of his debts, without saying, that after his debts paid the term shall cease, or attend the inheritance, yet equity of course says, that after the debts paid, the term shall attend the inheritance, because the trust is at an end.

[374] Now in the principal case, the trusts are at an end, the *cestuique trusts* being all dead.

Therefore, *pari ratione*, the term shall attend the inheritance.

In marriage-settlements, there are (generally) terms for years created for raising portions, and in those cases, after the portions raised, the terms shall of course attend the inheritance; nay, and (which is yet stronger) where the party who was to have the portion died before it became due, the Court has declared the term should attend the inheritance.

If a man has a term for years made to him by way of mortgage in his own name, and afterwards purchases the inheritance of the premisses in a trustee's name, it has been decreed, that the term should attend the inheritance. (*z*)

(*z*) *Whitchurch* v. *Whitchurch*, post. Vol. II. 236.

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The case of *Holt* v. *Holt* is much stronger than the principal case, where a man having a mortgage for years, and intending to purchase the inheritance, assigned the mortgage to trustees, in trust for himself, his executors and administrators, and purchased the inheritance in his own name, yet the trust of the term was decreed to attend the inheritance, tho' assigned expressly in trust for his executors, which shewed, nay expressed, an intent, that the trust of the term should go from his heirs, and to his executors. (*z*)

I shall only add one case more, which is that of (*a*) *Best* v. *Stamford*, in *November* 1705, before Lord Keeper *Cowper*, and is in Serjeant *Salkeld*'s Rep. 154. A feme sole seised in fee, on her marriage with *A.* made a lease to trustees for 100 years, in trust for her husband *A.* for his life, remainder in trust for herself for life, remainder in trust for the children of the marriage; and for want of such issue, in trust for the wife, her executors and administrators, (which bears a pretty near resemblance to the principal case); the husband died, and there was no issue of that marriage, and the wife married a second husband, and died, and this second husband, as administrator to the wife, sued in equity for this term; but decreed by Lord *Cowper*, in this case, that the trust of the term being at an end, it should attend the inheritance, and should not be for the benefit of the second husband, tho' expressly limited to go to the wife's executors and administrators; which is stronger than the principal case.

(*a*) 2 Vern. 520. Pre. Cha. 252.

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Thus have I humbly laid this poor man's case before your Honour.

And upon the whole matter,

As this is a term created *de novo* by him who at the same time had the inheritance;

As the heir is more favoured than the executor;

As the construction of making terms attendant on the inheritance has prevailed in equity;

As all the trusts declared concerning this term, that are not void at law, are determined by the death of all the *cestui que trusts*;

As the precedents that have been cited, all of them come up to the case, and some go beyond it;

Therefore I hope, for these reasons, the term of ninety-nine years, in the principal case, shall attend the inheritance, and

(*z*) See *Tiffin* v. *Tiffin*, 1 Vern. 1.

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consequently that this pauper, who is heir at law to this inheritance, shall be intitled to the trust of the term.

Resolutio curiæ.

But afterwards the Master of the Rolls, on consideration of this case, decreed the title to belong to the assignee of *Margaret Pile* the wife, and that this term should not be attendant on the inheritance; for that the party, who raised this term, and had power to sever it from the inheritance, shewed his intention so to do, by limiting the trust to the survivor of him and his wife, and the heirs of the survivor, which, tho' it was a void limitation, yet sufficed to shew his intent to sever such term from the reversion. (1)

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(1) Vide *Goodright* v. *Sales*, 2 Wils. 69. *Willoughby* v. *Willoughby*, 1 T. R. 329. *Scott* v. *Fenhoulet*, 1 Bro. C. C. 763.

CASE 98. ATTORNEY GENERAL (*at the Relation of the Overseers of Islington*) *versus* THE BREWERS' COMPANY.

LORD CHANCELLOR COWPER.

INFORMATION to settle a charity given by Lady *Owen* many years since, whereby she devised divers lands to the defendants the Brewers' Company, in trust to pay certain annuities thereout to the poor of *Islington*; since which, the lands being improved, the information was for an account of this charity.

2 Eq. Ca. Ab. 530. pl. 6. Costs not always to follow the event of the cause; as where though money was found due to the defendant upon account, yet it appearing to be much less than had been claimed by the defendant's answer, in that case the defendant was allowed no costs.

The Brewers' Company insist by their answer, that there is 800*l.* due to them from the charity; but that, however, they have not stopped the payment to the poor, and are willing the improved rents shall be applied for the benefit of the charity.

[377] The Court, at the hearing, decreed an account of the charity, and of the debt due from thence to the company, and reserved the consideration of interest and costs.

The master reports but 180*l.* due from the charity to the company.

And now the cause coming on upon the equity reserved,

the Court ordered interest to the defendants the company for the 180*l.* from the time of confirming the (1) report, and not before; for that until then, it was no liquidated sum.

ATTORNEY GENERAL *v.* BREWERS' COMPANY.

Interest but from the time of the Master's report confirmed, where the debt is not before liquidated.

But as to costs, the defendants the company to have none, though the balance was in their favour, forasmuch (2) as they would have overcharged the charity six hundred and twenty pounds; and the plaintiffs to have their costs; for that they had been serviceable to the charity, by easing them of the six hundred and twenty pounds debt, which was claimed against them.

The interest and the plaintiff's costs to be paid out of the improved rents of the charity.

(1) Vide *Brown* v. *Barkham*, post. 653.

(2) Vide *Parrot* v. *Treby*, Pre. Cha. 254.

DE TERM. S. MICHAELIS, 1717.

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39. Ch. D. 128.
43. — 589.

SQUIB *versus* WYN. (1)

CASE 99.

LORD CHANCELLOR COWPER.

Feme covert possessed of choses in action, dies; her husband administers and makes a voluntary assignment; this is an alteration of the property. So if the husband had survived, and then had died without altering it, or so much as administering to his wife.

MR. *Harbord* had four daughters, (*viz.*) the Countess of *Kingston*, Lady *Aiscough*, *Grace Hatcher*, and Lady *Wyn*, and after having given some legacies, devised his real and personal estate equally among his four daughters, and died.

(1) Reg. Lib. B. 1717. fo. 195. It appears by the Master's report in this cause, that Mr. *Hatcher* took out letters of administration to his wife *Grace*, and some time after her death assigned all his right, title, and interest to and in his said late wife's share of Mr. *Harbord's* or Lady *Kingston's* personal estate to *Snow*, in consideration of 350*l.* of which sum 124*l.* 7*s.* 3*d.* was actually paid by *Snow* to or for the use of Mr. *Hatcher*. *Jane Hatcher*, the second wife having, administered, as stated in the case, impeached this assignment to *Snow* for fraud; and after some time they came to an agreement that *Snow* should waive all benefit of the assignment upon being repaid the 124*l.* 7*s.* 3*d.* actually paid by him to Mr. *Hatcher*, which being done the assignment was delivered up and cancelled. "His lordship was of opinion "that as the spiritual court hath granted

SQUIB *v.* WYN.

The Countess of *Kingston* died intestate, and the Lord *Orford* administered to her, and Mr. *Hatcher* the husband of one of the daughters, assigned over all that share of the personal estate which came to his wife, by the death of the Countess, (and which consisted of choses in action,) unto Mr. *Richard Snow; Grace Hatcher* afterwards died, and Mr. *Hatcher,* having married again, died intestate, and his second wife having administered to him, and having also gained administration in the spiritual court to *Grace Hatcher de bonis non* administered by her husband:

[379] The question was, who had a right to Mrs. *Grace Hatcher*'s share of the Countess of *Kingston*'s personal estate?

It was insisted for the surviving daughters of Mr. *Harbord,* that Mrs. *Hatcher*'s share of Lady *Kingston*'s personal estate was but a chose in action, and that though a right to a third part of it vested in *Grace Hatcher,* yet the husband's assignment of it being only voluntary, was not to be regarded in equity. *Secus* if the assignment had been for a valuable consideration.

That a voluntary assignment by Mr. *Hatcher* would not have bound Mrs. *Hatcher,* if she had survived, and by the same reason should not bind her representatives, now she was dead.

Nay, that this assignment to *Snow* by the husband was worse than voluntary, it being fraudulent, and said to be so by his second wife, who now made a title to it; and therefore such an assignment, as she herself, who would take advantage of it, called fraudulent, ought not to prevail.

Wherefore, if the assignment was out of the case, the husband *Hatcher,* upon the death of his wife, had not (as husband, and surviving his wife) the least right vested in him, to any of his wife's choses in action, but must take out administration to his wife, and after he should have done so, the letters of administration would give him nothing, but only a power of altering the property, which power if not made use of, it then would be as if he had never had it.

[380] That the statute of distribution would not better the husband's title in this case; since the clause in the statute of

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"to *Jane Hatcher* letters of administration to the said *Grace Hatcher* as to the said third part of the said Lady *Kingston's* personal estate unadministered by the said Mr. *Hatcher;* his lordship was also of opinion that the said defendant *Jane,* hath a right to the said third part of the said Lady *Kingston's* personal estate, and doth therefore order that the said Lady *Kingston's* personal estate be divided and paid accordingly."

frauds, (29 Car. 2. cap. 3. sect. 25.) which says, that the statute of distribution shall not (1) affect the husband's right to his wife's personal estate, exempts him from distributing, only in cases where he has an *interest vested in him*, which here he had not: so that it was the same case, as if the statute of distribution had never been made; or as if this case had happened before that statute. Consequently, after the husband's death without altering the property, then the choses in action of the wife, not administered by the husband, did fall within the statute of distribution, and became divisible amongst the next of kin of *Grace* the intestate, the wife of *Hatcher*. SQUIB v. WYN.

Neither was it material that the defendant, the second wife of *Hatcher*, had gained administration *de bonis non, &c.* of *Grace* the first wife, for still she was but a hand to receive the money, subject to distribution according to the statute.

Lord Chancellor: The husband's title at law to the personal estate of the wife is favoured; even a term which is a chattel real, shall go to the husband (*a*) surviving his wife; and as to all the personal goods, they are his by the intermarriage. Tho' the husband administering to the wife is (2) liable to pay her debts, yet he is intitled to the surplus, which will go to his representatives; and as to this assignment, notwithstanding it was voluntary, I cannot but think it did bind (3) the property; for there might be time spent, and delays used, before the husband could recover this personal estate in equity; but the delay of suits ought not to turn to his (4) prejudice. And with respect to the clause in the statute of frauds, the exception does not confine it to the life of the hus- [381]

(*a*) 1 Inst. 46. b. 357. b.

(1) "Nothing in the said act shall "be construed to extend to the estates "of femes covertes that shall die intes- "tate, but that their husbands may de- "mand and have administration of their "rights, credits, and other personal "estates, and recover and enjoy the "same, as they might have done before "the making of the said act."

(2) Vide *Earl of Thomond* v. *Earl of Suffolk*, post. 468. *Heard* v. *Stamford*, post. Vol. III. 409.

(3) That is, that although the assignment from *Hatcher* to *Snow* was void as between *them*, yet still it should be sufficient to alter the property as between the husband and wife.

(4) The order of the Court for payment of the wife's legacy to the husband in her right, vests it in the husband, though he die before payment, and the wife is defeated of her right by survivorship. *Heygate* v. *Annesley*, 3 Bro. C. C. 362. (*z*)

(*z*) See *Macaulay* v. *Philips*, 4 Ves. 15.

SQUIB v. WYN.

band, or to the circumstance of his having reduced any part of the wife's personal estate into possession, but provides, that no part of her estate shall be distributable amongst her relations after her death.

So that it seems reasonable the assignment should be taken to alter the property; besides, that it is the very ground of the difference, that choses in action are assignable (1) in equity, though not at law; and this matter seems to have been decided by the spiritual court in favour of the husband and his representatives, by that court's granting administration *de bonis non* of *Grace Hatcher* to the next of kin of the husband: Wherefore

Decree the benefit of *Grace Hatcher*'s share of her deceased sister's personal estate to the administratrix of *Hatcher* the husband.

(*a*) Jovis, 27 Nov.

2. Bartad. 273.

See the case of *Cart* and *Rees* in *Michaelmas* (*a*) term 1718, where this stronger case happened, (*viz.*) A wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which, the next of kin of the wife administered to her, and Lord *Parker* held, that the administrator to the wife was but a trustee for the executor of the husband, (*y*) the right to the wife's choses in action being, by the statute of distribution, vested in the husband, as next of kin to the wife; and whereas there is a proviso in 29 *Car.* 2. saying that the statute of distribution shall not extend to the estates of feme coverts that die intestate, but that their husbands may have administration of their personal estate, as before the making the act:

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His Lordship said, this clause was made in favour of the husband, and not to his prejudice; so that it was intended by the parliament, that the husband should be within the statute of distribution, so as to take the wife's choses in action, as to

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(1) But it seems settled, that although a husband may assign his wife's choses in action, yet it must be for a valuable consideration, and that beyond the consideration such assignment will not bind the wife surviving, *Bates* v. *Dandy*, 2 Atk. 207. *Jewson* v. *Moulson*, ib. 417. *Saddington* v. *Kinsman*, 1 Bro. C.C. 44. (*z*) As to the equity to which such property is subject in the hands of an assignee, *vide* the next case, *Jacobson* v. *Williams*.

(*z*) An assignment by husband, for a valuable consideration, of a reversionary interest of the wife, even tho' the wife joins in it, does not bind her surviving; *Hornsby* v. *Lee*, 2 Mad. 16. And see *Cordell* v. *Acton*, cited 5 Mad. 162.

(*y*) So *Humphrey* v. *Bullen*, 1 Atk. 458. And see *Watt* v. *Watt*, 3 Ves. 244.

his benefit, but should not be within the same, as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason; for were the construction to be otherwise, the husband of the wife intestate, would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute. SQUIB v. WYN.

And there Mr. *Vernon* cited this case of Lady *Aiscough*, wherein he said Lord *Cowper*'s opinion was the same with Lord *Parker*'s, (*viz.*) that the wife's choses in action did vest in the husband by the statute of distribution; so that since this resolution, the right of administration (*a*) follows the right to the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin to the husband in the same manner, as it is granted to a residuary legatee. (1)

(*a*) Includes.

(1) Vide *Bacon* v. *Bryant*, 11 Vin. Ab. 88. pl. 25. *Humphrey* v. *Bullen*, ib. pl. 26. *Elliot* v. *Collier*, 3 Atk. 526. 1 Vez. 15. 1 Wils. 168. *Bouchier* v. *Taylor*, Harg. Law Tracts, 473. 7 Bro. P. C. 414.

JACOBSON *et al' versus* WILLIAMS.

CASE 100.

LORD CHANCELLOR COWPER.

WALTER Wallinger by his will left to his niece *Elizabeth Tayleur* an infant, 1000*l.* payable after the death of the testator's wife, and at his said niece's age of twenty years, if she should live so long.

1 Eq. Ca. Ab. 54. pl. 7. Gilb. Rep. 140.

See more relating to this case in the case of Richmond v. Tayleur, post, 734. Husband before he hath received the wife's fortune becomes a bankrupt; the assignees shall not receive it, without making some provision for the wife.

The niece married *J.S.* without the knowledge or consent of her father, *J. S.* being at that time much in debt by judgment, and otherwise, and having gained the young gentlewoman's consent by bribing her maid-servant; the niece was about eighteen years of age. [383]

Soon after the marriage, *J. S.* became a bankrupt, and the commissioners of bankruptcy assigned over all the estate and effects of the bankrupt to the plaintiffs, in trust for the creditors, who brought their bill for this legacy, the testator's widow being dead, and the niece being above twenty years old, and consequently the legacy due; and the bankrupt had two children by his wife then living.

This cause coming on before Baron *Price*, in the absence of the Lord Chancellor, the Baron, in regard to creditors, did decree the legacy and interest to be paid to the plaintiffs.

JACOBSON v. WILLIAMS.

But upon an appeal from that decree to the Lord Chancellor, his Lordship declared, that forasmuch as the plaintiffs the assignees in the commission claimed under the bankrupt, they ought not to be in a better case (*a*) than the bankrupt himself; and since, if he had brought a bill for this legacy, the court would not have allowed it him, without obliging him, at the same time, to make some (1) provision for the wife and children; so for the same reason, when these claiming under the bankrupt, and who must be exactly in the same case as he himself would have been in, came for equity, they ought to do equity, which would be to provide for the wife and children of the bankrupt, from whom they derived their claim.

(*a*) Post. Bosvil v. Brander, 459.

But with regard to the interest of the money, as the bankrupt commonly was allowed to receive that, so the assignees
[384] ought to receive the same during the bankrupt's life. Also, if the bankrupt's wife should die without issue, then the bankrupt would have been allowed to receive the whole money; and therefore, in such case, the assignees should be allowed to receive it also.

As to the objection, that the assignment was made by the commissioners before any right to the legacy vested in the wife, (*viz.*) before she was twenty, so that at that time the legacy was not vested, and, by possibility, might never vest, forasmuch as she might have died before twenty;

Lord Chancellor said, that was not to be so much regarded; because the commissioners might supply it by making a

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(1) A court of equity will not interrupt the *legal* title of the husband to the property of the wife, unless called upon *by the husband* to lend him its assistance in respect of such property. *Milner* v. *Colmer*, post. Vol. II. 639. *Adams* v. *Pierce*, post. Vol. III. 11. *Willats* v. *Cay*, 2 Atk. 67. *Jewson* v. *Moulson*, ib. 420. But if he *ask* for equity, he must do equity, by providing for the wife. *Brown* v. *Elton*, post. Vol. III. 202. If the husband become bankrupt, all such property of the wife, as he could assign or release, passes by the commissioners' assignment to the assignees, *Miles* v. *Williams*, ante, 251. But they take it subject to the same equity of providing for the wife. *Bosville* v. *Brander*, post. 458. *Ex parte Coysegame*, 1 Atk. 192. *Grey* v. *Kentish*, ib. 280. & post. 459. (note) *Worrall* v. *Marlar*, and *Bushnan* v. *Pell.* (*z*) *As* to the case of a *particular assignee of the husband* for a valuable consideration, vide *Bosville* v. *Brander*, post. 458. As to voluntary assignments, vide *Squib* v. *Wyn*, ante, 381.

(*z*) 1 Cox. 153. And see *Franco* v. *Franco*, 4 Ves. 515. *Salisbury* v. *Newton*, 1 Eden. 370. *Mitford* v. *Mitford*, 9 Ves. 87. *Wright* v. *Morley*, 11 Ves. 21. and cases there cited. *Elliott* v. *Cordell*, 5 Mad. 149. *Aguilar* v. *Aguilar*, ib. 414. *Green* v. *Otte*, 1 S. & S. 250.

new (*z*) assignment, though (it was true) such new assignment would not help this bill, so as to intitle the plaintiffs to any decree thereon.

That he took it for granted, there were no precedents in this case, there being none cited on either side, and therefore the court was at liberty to judge upon the reason of the thing; but however, a judge having given a contrary opinion, he would take time to consider of it,

And on the cause's coming on again, Mr. *Vernon*, for the defendant, cited the case of *Taylor* and (*a*) *Wheeler*, where *A.* mortgaged a copyhold for a considerable sum of money, but the conveyance was defective for want of a surrender being presented in time, after which *A.* became a bankrupt, and the court helped the mortgagee of the copyhold against the assignees under the commission, which he urged to be an argument, that the creditors or assignees of the commissioners are not to be regarded as purchasers.

(*a*) 2 Vern. 564. See this case also cited ante, Finch v. Earl of Winchelsea, 280.

It was moreover observed to the court, that the bankrupt had, in this case, gained his certificate, and was discharged, and that the assignment made to the complainants being before the legacy was vested, if they could not now supply the assignment by making a new one, the consequence was, that the legacy was become vested in the bankrupt.

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But the Lord Chancellor replied, that this not appearing in the pleadings, he could take no notice of it.

Nevertheless, at another day, the fact being made to appear by a petition, with the certificate of the commissioners, and the allowance of the Lord Chancellor *Harcourt* annexed, the court said, it was clear, the commissioners could not assign this possibility of right which the bankrupt had to the portion, and consequently the assignees being plaintiffs in the bill, and intitling themselves under this assignment, and this assignment being void, with respect to such † possibility,

Possibility of right belonging to a bankrupt not assignable.

† But the reason given above, *viz.* because the bankrupt the husband could not have come at his wife's portion without the assistance of a court of equity which would not have decreed it to him, but on his making some provision for his wife, seems to have been the best foundation for this decree; since a possibility or contingent interest is certainly assignable by the commissioners. Thus, in the case of *Higden* v. (1) *Williamson*, first heard at the Rolls, *Mich.* 1731, and afterwards

(1) Post. Vol. III. 132. Et vide 2 Atk. 420.

(*z*) See *Ex parte Proudfoot*, 1 Atk. 252. *Kitchen* v. *Bartsch*, 7 East, 53. St. 6 G. 4. c. 16. s. 63.

JACOBSON *v.* WILLIAMS.

Commissioners of bankruptcy having made an assignment of the bankrupt's estate, and afterwards given the bankrupt his certificate and discharge, cannot make a subsequent assignment.

therefore the bill must be dismissed, but without costs, because the plaintiffs were creditors.

Afterwards in *Trin. Term* 1718, the wife of *J. S.* by her next friend, having brought a bill setting forth her being seduced into this marriage, and the husband's bankruptcy, together with the certificate for his discharge, prayed, that the money might be put out for her separate use for her life, and afterwards for her children; to which the husband putting in his answer, and declaring himself sensible of his having injured his wife, in manner as above, submitted to what was desired by the bill, only he prayed the arrears of interest.

On the other hand, the assignees opposed the bill, insisting, that the commissioners might still make a new assignment of this, which was now, and not before, vested.

But by Lord Chancellor *Parker:* The commissioners have executed their power, and the debts, which the husband the bankrupt owed to the creditors before the bankruptcy, are now extinct by act of parliament, and this portion is as a new acquired estate by the husband, in right of his wife.

Wherefore, since the husband agrees to this prayer of the wife's bill, (which is but a reasonable reparation for the wrong he has done her),

Decree the husband the arrears of interest, deducting the costs, and let the legacy be laid out in a purchase; and in the mean time, let the wife have the interest for her separate use, &c. By which means the whole legacy was saved to the wife, and to her separate use.

affirmed by lord chancellor *King* in *Mich.* 1732. the case in effect was, An estate was devised to be sold, and the monies arising from such sale to be divided amongst such of the children of *A.* as should be living at *A.*'s death; *A.* had several children, one of whom, *viz. B.* became a bankrupt, and the commissioners assigned over his estate, after which *B.* got his certificate allowed, and then *A.* died. Decreed that this share of the money, which on *A.*'s death belonged to *B.* should be paid to the commissioners; for that not only the latter statutes relating to bankrupts, mention the word [possibility]; but also, because the 13 Eliz. cap. 7. sect. 2. impowers the commissioners to assign all that the bankrupt *might depart with*, and here *B.* in the life-time of *A.* might have released this contingent interest. Besides, the 21 Jac. 1. cap. 19. enacts, that the statutes relating to bankrupts shall be construed in the most beneficial manner for creditors.

ELSE *versus* OSBORN. (1)

CASE 101.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 702. pl. 3.
2 Vern. 754.

A. settles to the use of himself for ninety-nine years, if he should so long live, remainder to trustees during his life, &c. remainder to the heirs of his body, remainder to *A.* in fee; *A.* has two sons, and *A.* and the trustees and the eldest son join in a mortgage by feoffment, and the eldest dies without issue; the second son, during the life of the father, has no pretence to set aside the mortgage; tho' this seems a breach of trust in the trustees.

A. Makes a settlement to the use of himself for ninety-nine years (if he so long live), remainder to trustees and their heirs during his life, &c. remainder to the use of the heirs of his body, remainder to himself in fee; *A.* has two sons, and *A.* and the trustees, and the eldest son when of age, join in a feoffment and fine to *B.* in fee, as a security for so much money; the eldest son dies without issue, and the second brings a bill to set aside this mortgage.

Lord Chancellor: This is plainly a contingent remainder, being limited to the heirs of the body of *A.* who can have no heir during his life: for *nemo est hæres viventis;* and it is as plain, that this feoffment does at law destroy the contingent remainder, in regard the trustees, who had the freehold, joined.

But it may be here a question, whether this be a breach of trust in the trustees?

It is true, if the eldest son joins in a feoffment, where the remainder in tail is limited to the *eldest son,* it prevents any breach of trust in the trustees; but here the limitation being to the *heirs of the body* of *A.* who cannot have an heir of his body during his own life, therefore the joining of the eldest son is not, in this case, so material.

And yet it seems hard, when the heir apparent joins, in a case where it would be no breach of trust if the limitation were to the eldest son, that it should be a breach of trust in respect of the limitation to the heir. [388]

However, the meaning of the limitation, in the principal case, is, to carry the settlement as far as may be, and beyond

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(1) Reg. Lib. A. 1717. fol. 54. under the name of *Else* v. *Doughty* and *Osborn.* The question arose on the argument of a plea put in by the defendant *Osborn,* who pleaded an indenture of feoffment dated 27 *July,* 1703, with livery of seisin by *John Steer* the father, the surviving trustee, and the eldest son by way of mortgage to *Doughty* for securing payment of a sum of 50*l.* and interest, with proviso that on re-payment of that money *Doughty* should convey the premises to *Steer* the father, his heirs and assigns for ever. And that by an indenture of feoffment of 1st *April* 1705. *Doughty* and *Steer* the father conveyed the premises to the defendant *Osborn* in fee for a full valuable consideration; and the plea was allowed.

ELSE *v.* OSBORN.

the limitation to the first son, and the trustees appointed to preserve the contingent remainders, ought not to join in destroying these remainders, which is acting the (*a*) reverse of their trust. (*z*)

(*a*) Vide ante, the cases of Pye v. Gorge, 129. Basset v. Clapham, 358. and Mansell v. Mansell, post. Vol. II. 678.

But after all, as to the present bill, it is clear, the second son, tho' he has survived the eldest, yet has no right to bring it in the father's life-time; for he neither is, nor possibly ever will be, the heir of his father, unless he survives his father, which is uncertain. (*y*)

(*z*) *Parkhurst* v. *Smith*, Willes, 339. 251. *Allan* v. *Allan*, 15 Ves. 130. And
(*y*) *Dursley* v. *Fitzhardinge*, 6 Ves. see *Winnington* v. *Foley*, post. 536.

CASE 102.

PLUME *versus* BEALE.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 421. pl. 1.

A BILL was brought by the executor of doctor *Plume*, to be relieved against a legacy of 100*l.* claimed by the defendant *Beale*, as given by the will of doctor *Plume*.

Executor proves a will of a personal estate, wherein one of the legacies is forged; the executor has no remedy in equity, but ought to have proved the will with a special reservation as to that legacy.

Turner 4 Pl. 139.

The defendant *Beale* was no relation to the doctor, nor had done him any service, saving that now and then she had, during his illness, brought him some few slight cordials, in return for which, the doctor had ordered her a piece of plate.

This 100*l.* legacy was interlined in the will by a different hand, and supposed to have been done by the defendant herself, when she was left in the room alone with the corpse, in which room the will was left.

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But forasmuch as the will was proved by the plaintiff the executor in a proper court, that had a proper (*a*) jurisdiction, (it relating only to a personal estate,) and more especially, for that the executor might have proved the will in the spiritual court, with a particular reservation as to this legacy, the court said, his remedy must be there; and dismissed the bill with costs. (1)

(*a*) 2 Vern. 8. 77. Ante, 12. Twaites v. Smith, & post. Vol. II. 287. Stephenton v. Gardiner.

(1) So *Kerrich* v. *Bransby*, 3 Bro. P. C. 358. *Bennet* v. *Vade*, 2 Atk. 324. *Bouchier* v. *Taylor*, 7 Bro. P.C. 414. *Meadows* v. *Dutchess of Kingston*, Amb. 756. But with respect to the limits of the jurisdiction of a court of equity in testamentary matters, vide *Marriott* v. *Marriott*, 1 Stra. 666. *Hill* v. *Turner*, 1 Atk. 515. *Sheffield* v. *Duchess of Buckinghamshire*, 1 Atk. 628. *Barnesley* v. *Powell*, 1 Vez. 119. 284. (*z*)

(*z*) And see *Allen* v. *Dundas*, 3 T. R. 125. 4 Burn's Ecc. Law, 261.

1917.2.Ch.229.

SEELEY *versus* JAGO.

CASE 103.

LORD CHANCELLOR COWPER.

One devises 1000*l.* to be laid out in a purchase of lands in fee for the benefit of *A.*, *B.*, and *C.* and their heirs, equally to be divided; *A.* dies, leaving an infant heir; *B.* and *C.* may have their share paid them in money, but the infant cannot.

ONE devised that 1000*l.* should be laid out in a purchase of lands in fee, to be settled upon *A.* *B.* and *C.* and their heirs, *equally to be divided*; *A.* dies leaving an infant heir; and *B.* and *C.* together with the infant heir, bring a bill for this 1000*l.*

Lord Chancellor: The money being directed to be laid out in lands for *A.* *B.* and *C.* *equally*, (which makes them tenants in common), and *B.* and *C.* electing to have their two thirds in money, let it be paid to them; for it is in vain to lay out this money in land for *B.* and *C.* when the next moment they may turn it into money; and equity, like nature, will do nothing in vain.

But as to the share of the infant, that must be brought before the Master, and put out for the benefit of the infant, who, by reason of his infancy, is incapable of making an election. Besides, that such election might, were he to die during his infancy, be prejudicial to his heir. (1)

(1) Vide *Benson* v. *Benson*, ante 131.

DE TERM. S. HILLARII, 1717. [390]

STARKEY *versus* BROOKS.

CASE 104.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 496. pl. 14.

One devises lands to his executors, (who are no relations,) to sell for the best price, and to pay his debts, legacies, and funerals, so far as the same will extend, and gives legacies to his heirs at law, and 100*l.* to the children of one of his executors, but nothing to his executors; in such case the executors shall be but trustees for the heirs at law, after debts paid.

PHILIP Starkey, being seised in fee, devises his lands to two gentlemen of his acquaintance, (but who were not of kin to him), and their heirs, in trust to be sold by them, or the survivor of them, for the best price, and with the money to pay his debts, legacies, and funerals, so far as the same will

STARKEY v. BROOKS.

extend, and, among other legacies, he gives 40*l.* to *Jane Stiles*, and 10*l.* to *Elizabeth Stiles* (who were his cousins and co-heirs), and makes the two devisees executors, giving 100*l.* to the children of one of them.

The surplus of the money arising by the sale being 500*l.*, the question was, whether it should go to the trustees who were also executors, or to the heirs at law, who, in this case, brought a bill against the executors, for an account of the surplus.

[391] On behalf of the devisees the executors, it was objected, that here were express legacies given to the co-heirs, which implied, that they should have no more, and the case of *Crompton* v. *North*, Chan. Rep. 196. was said to be in point; also, in this case, as there were legacies given to the heirs at law, so on the other hand nothing was left to the executors.

Lord Chancellor: In cases of this nature, the circumstances must govern: (1)

Now the chief objection is, that here are express legacies given to the heirs at law, and none to the executors; but the will being, that the executors should sell the estate for the best price that they could get for the same, this clause need not to have been put in, if the devisees were intended to be owners.

Besides, supposing the personal estate had been sufficient to have paid the debts, and that there had been no need of any sale, surely the devisees should not, in such case, have gone away with the estate from the heir at law.

It is material also, that the trustees are to apply the money arising by the sale in payment of debts, legacies, and funerals, by which is implied the whole money, and that shews it was not designed to be a beneficial trust. (2)

Again, devising the estate, and power of sale to the survivor, is a farther argument of its being rather a trust than an ownership, and that the trust was intended to follow the estate.

Wherefore let the devisees account for the surplus to the heirs at law.

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(1) Vide *Hobart* v. *Countess of Suffolk*, 2 Vern. 644. *Hill* v. *Bishop of London*, 1 Atk. 618. *Cook* v. *Duckenfield*, 2 Atk. 562. (*z*)

(2) Vide *Cruse* v. *Barley*, post. Vol. III. 20.

(*z*) *King* v. *Denison*, 1 V. & B. 260.

JENNER *versus* MORGAN.

CASE 105.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 704. pl. 1. Tenant for life leases for years, rendering rent half-yearly, and dies in the middle of the half-year; equity will not apportion the rent, as to time.

THE father being tenant for life, remainder in tail to the son the plaintiff, the father was indebted by several judgments, and his land extended by *J. S.* a judgment creditor, who leased the same to the defendant, rendering 160*l. per annum* payable quarterly.

March 6, 1710, the father the tenant for life died, and the defendant the tenant continuing in possession until after the *Lady-day* following;

It was insisted for the plaintiff, that the *Lady-day*'s rent (being 40*l.*) ought to be paid to the plaintiff by the defendant the tenant, for that the defendant, by his holding over, shewed his election to continue tenant at will to the plaintiff the son; and that this could be no hardship on the tenant, since in all events he ought to pay his rent to (*a*) some person, and *J. S.* the judgment creditor could have no pretence to the *Lady-day*'s rent; and though, in this case, the tenant for life died 6 *March*, the reason had been the same, if he had died the day after *Christmas-day*.

(*a*) Vide ante, 180. Lord Strafford v. Lady Wentworth.

Lord Chancellor: There are several remedial statutes relating to rents, but this is *casus omissus*; the law does not apportion rent, in point of (*a*) time, and I do not know that equity ever did it; this is an accident which the judgment creditor might have guarded against, by reserving the rent weekly; so that it is his fault, and becomes a gift in law to the tenant.

(*a*) 1 Inst. 292. b. 10 Rep. 128.

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Whereupon the court held, that as to the profits from the end of the last quarter, to the death of the tenant for life, the tenant should pay nothing; but for the profits, from the death of the tenant for life, the tenant the under-lessee was to account to the plaintiff; and with regard to the notion, that the tenant's remaining in possession, shewed his election to continue at the old rent; this, the court said, only shewed his election from that time, and not from the end of the preceding quarter-day. (1)

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(1) But by stat. 11 *Geo.* 2. c. 19. *s.* 15. the executors of *tenant for life* are intitled to a proportion of the rent. And in *Paget* v. *Gee*, 1 Burn. Just. 483. (*z*) and Amb. 198. Lord *Hardwicke* was of opinion that the executors of tenant *in tail* were intitled to a like apportionment. For apportionment in equity, vide *Hay* v. *Palmer*, post. Vol. II. 501. (*y*)

(*z*) 895, 24th Edit.

(*y*) And see *Rockingham* v. *Penrice*, ante 177. *Ex parte Smyth*, 1 Swan. 337.

CASE 106. MOCATTA *et al' versus* MURGATROYD.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 612. pl. 2.

AN owner of a ship mortgages his ship to *A.* with whom he leaves the original bill of sale, and this mortgage to *A.* is made by a mortgage only, without any indorsement, or notice of the mortgage on the bill of sale, as is usual.

Afterwards the mortgagor desired *A.* the mortgagee, to let him have the original bill of sale, which was complied with, and thereupon the mortgagor made several subsequent mortgages of several parts of the ship, which were indorsed upon the original bill of sale, and sometime afterwards the mortgagor delivered up the bill of sale to *A.* the mortgagee, who made no objection, or complaint of these indorsements; it appeared likewise in the case, that the owner of the ship had made a prior mortgage to this of *A.*'s by a deed bearing date the day before, but that the prior mortgagee was a witness to the mortgage deed made to *A.*; also *A.* the mortgagee sometime afterwards took a release, from the mortgagor, of his equity of redemption.

[394] In which case, these points were decreed by the Lord Chancellor:

Where a first mortgagee is a witness to the second mortgage, tho' no actual proof of his knowing the contents thereof, yet since the presumption is that he might have known the same, this shall postpone him.

1*st*, That the first mortgagee of the ship being a witness to the second mortgage, tho' it did not appear, that he actually knew the contents of the second mortgage, yet since it did not appear, but that he might know them, it would be presumed, that every witness that could write or read, was acquainted with the substance of the deed or instrument, which he, having attested it, undertook to support by his evidence; and that therefore, in the principal case, the first mortgagee being a witness to the second mortgage, and not acquainting the second mortgagee with his former mortgage, this should give a † preference to the second mortgage. (1)

† *Qu. tamen*, Whether the bare attesting a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrancer, since at that rate, a prior mortgagee or incumbrancer may, without any fraud or ill intention on his side, be liable to be cheated of his security: and so I find it said by Lord *King* in our author's report of an *anonymous* case, in *Mich.* 1732.

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(1) None of the cases seem to come up to this point, vide *Hobbs* v. *Norton*, 1 Vern. 136. *Peter* v. *Russell*, 1 Eq. Ca. Ab. 321. pl. 7. *Ibbotson* v. *Rhodes*, 2 Vern. 554. *Head* v. *Egerton*, post. Vol. III. 280. *Berrisford* v. *Milward*,

MOCATTA v. MURGATROYD. Mortgagee of a ship, by deed intrusts the mortgagor with the original bill of sale, and the mortgagor indorses thereon subsequent mortgages or bills of sale of several parts of the ship, and mortgagee acquiesces; this is evidence of an assent in such mortgagee, and shall therefore postpone him. (z)

2*dly*, That when *A.* the mortgagee was so careless, as to intrust the mortgagor with the original bill of sale, by which means indorsements of the subsequent mortgages were made thereon, and accepted again of the bill of sale from the mortgagor, without making any complaint, or taking any exception thereto; this, together with the long acquiescence afterwards, amount to an implied consent in *A.* to the subsequent mortgages of the several parts of the ship that had been indorsed, and should give a preference to such mortgages.

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The first mortgagee takes a release of the ultimate equity of redemption; this does not oblige the said first mortgagee to pay off the intermediate mortgages, if he will waive the release.

3*dly*, That though *A.* the mortgagee, when there were subsequent mortgages, took afterwards a release of the ultimate equity of redemption, yet this did not oblige the said *A.* who had taken a release of such equity, to pay the intermediate mortgages, provided he would still waive the release made to him of the equity.

Mortgagee shall not onerate his pledge with costs which he occasions by an unjust defence. (y)

4*thly*, In this case *A.* the mortgagee was ordered to pay costs to the plaintiffs, who were indorsees of the subsequent mortgages or bills of sale; but *A.* was not to have his costs over, against the first mortgagor; in regard, Lord Chancellor said, it was not reasonable that *A.* should onerate his pledge with costs occasioned by his unjust defence,

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2 Atk. 49. *Anon.* (cited) 1 Vez. 96. *Becket* v. *Cordley*, 1 Bro. C. C. 353. from which it appears that in order to postpone a prior mortgagee, it is necessary to prove against him *fraud* or *actual notice* of the subsequent mortgage, and therefore in *Becket* v. *Cordley*, Lord *Thurlow* thought the present case of *Mocatta* v. *Murgatroyd*, went too far in imputing notice to the first mortgagee from the *mere* circumstance of his being a witness to the second mortgage, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents. *N.B.* The editor has not been able to find this decree in the Register's book.

(z) See *Plumb* v. *Fluitt*, 2 Anst. 432. 1 Fonb. Eq. 162. note n. *Evans* v. *Bicknell*, 6 Ves. 174. *Barnett* v. *Weston*, 12 Ves. 130. *Harper* v. *Faulder*, 4 Mad. 129. *Ex parte Meux*, 1 Gl. & Ja. 116.

(y) See *Morony* v. *O'Dea*, 1 Ba. & Be. 121.

CASE 107.

EKINS *versus* EAST-INDIA COMPANY.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 533. pl. 1. 534. pl. 2.

Interest allowed for a ship and cargo wrongfully taken by the defendant; and this being done in the Indies, Indian interest allowed, deducting the charge of the return.

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THE plaintiff *Ekins* was possessed of a ship, and the agent of the *East-India* Company in the *East-Indies* bought the ship, and the cargo in her, of the commander, who had no power to sell her; and there was some proof of the treachery of the commander, and of some indirect practices by the agent; but this seemed to have been done without the privity of the company, though for their use and benefit.

Ekins brings his bill to have an account of the ship and cargo from the company, who were decreed to account for the same; and an issue was directed to try the value of the ship and cargo, ta the time these came to the hands of the company's agent; upon which the jury found the value of the ship to be 3000*l.* and that of the cargo to amount to about 600*l.*

And now, upon the equity reserved, it was insisted, that the plaintiff ought to have interest, and that the interest ought to be *Indian* interest, which was about 12 *per cent.* Against which it was

Objected, 1*st*, That the value of the ship and cargo being uncertain, it could not, in the nature of it, carry interest, but from the time it was ascertained by the jury.

2*dly*, That the plaintiff had, at this time, rested thirteen years upon his own bill, and therefore to allow him *Indian* interest, would be to make him a gainer by his own delay.

Cur. If a man has my money by way of loan, he ought to answer interest; but if he detains my money from me wrongfully, he ought *à fortiori* to answer interest. (*z*) And it is still stronger, where one by wrong takes from me either my money or my goods which I am trading with, in order to turn them into money.

Therefore let the defendants pay interest; and this being transacted in the *Indies*, where the person who acted by authority under them, and for their use, must be presumed to have made the common advantage that money yields there, the company must answer the interest of that country; but in

(*z*) See *Pearse* v. *Green*, 1 J. & W. 135. *Treves* v. *Townsend*, 1 Cox, 50.

consideration this money is now to be paid *here*, the charge of returning it from the *Indies* ought to be deducted.

Let the Master see what was the interest of money during these years in the *Indies*, and what is the charge of returning money from the *Indies* to *England*, and he is to allow *Indian* interest, deducting out of it the charge of returning. (1) [397]

(1) This decree was affirmed on appeal to the House of Lords, 2 Bro. P. C. 72. But as to the allowance of Indian interest, vide *Boddam* v. *Ryley*, 2 Bro. C. C. 2. (*z*)

(*z*) And see *Law* v. *E. I. Company*, 4 Ves. 824. *Heathcote* v. *Hulme*, 1 J. & W. 135.

GOODRIGHT *versus* WRIGHT.

CASE 108.

SPECIAL verdict in ejectment upon this case: One seised in fee, devised the lands to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.* *A.* died without issue, in the life of the testator, and *B.* died in the life of the testator, leaving issue the defendant, who was also the heir of *A.* and the plaintiff in ejectment was the heir of the testator.

10 Mod. 370. 1 Stra. 25. 2 Eq. Ca. Ab. 359. pl. 13. Devise to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.* *A.* dies without issue in the life of the testator; *B.* dies in the life of the testator, leaving issue, who is also the heir of *A.* The issue shall not take an estate-tail as issue of *B.* nor the remainder in fee as heir of *A.* (1)

The question was, whether, in regard the devisees, *A.* and *B.* died in the life of the testator, the issue of *B.* (who was born after the making of the will, and so could not take jointly with the devisees), could take, either as heir of the body of *B.* or as right heir of *A.*?

And the opinion of the whole court was thus delivered by C. J. *Parker*.

(1) So, *Hutton* v. *Simpson*, 2 Vern. 722. & S.C. by the name of *Sympson* v. *Hornsby*, Pre. Cha. 439. *Hodgson* v. *Ambrose*, Doug. 337. *Warner* v. *White*, 1 Bro. C. C. 219. (note). (*z*)

(*z*) 3 Toml. P. C. 435. 11 East, 551. note (d), S. C. And see *Doe* v. *Kett*, 4 T. R. 601. *Brown* v. *Higgs*, 4 Ves. 718. *Doe* v. *Colyear*, 11 East, 548.

GOODRIGHT v. WRIGHT.

This case is exactly within the reason of *Bret* and *Rigden's* case. Plowd. 340.

1*st*, Because, as well in this case, the word [issue] as in that, the word [heirs] is clearly used as a word of limitation, *viz.* to measure out the quantity of estate that the devisee is to take, and not as a word of purchase, the devisee only being in the view and consideration of the testator, and the words,
[398] [heir, or issue,] mentioned for nothing else, but to limit what estate the devisee should take, and there is no diversity betwixt a devisee in fee, and a devisee in tail; the statute of *Westminster* the second makes none; for that only provides for the issue, in case where an estate-tail is actually created and vested, but makes no diversity at all in the rules of law concerning the creation of estates-tail, which are exactly the same, as to the intent of the devisor, or as to the vesting the estate, as those relating to estates in fee-simple; the statute *de donis* was made for the benefit of the issue in tail, which supposes an estate in tail in the ancestor (which is the question here); and the statute *de donis* is called the *nurse*, and not the *mother* of estates-tail.

2*dly*, Because the heir in tail is absolutely in the power of the ancestor, to be barred by him (since the statute of 4 H. 7. of fines, and the construction of law, which establishes common recoveries), as much as the heir in fee-simple is in the power of his ancestor; and therefore, as well in case of an estate-tail, as of a fee-simple, the devisor cannot be intended to have had any consideration for, or regard to, the heir, since in both cases the devisor gives the devisee such an estate, as enables him absolutely to bar his heir.

3*dly*, Another reason why the heir cannot take, when the devisee dies in the life of the devisor, is, because he cannot take by descent, for that nothing was ever in the ancestor; and if he should take as a purchaser, then the estate would be descendible contrary to the intent of the devisor; for if the ancestor had taken the estate, and it had descended to the
(*a*) Vide Littleton, sect. 4. heir, the rules of descent had been quite different (*a*) from what they would have been, if the heir had taken as a pur-
[399] chaser. Then, as to the remainder in fee limited to the heirs of *A.* it is also the opinion of the court, that the heir general cannot take it; for the interposition of the estate-tail to *B.* betwixt the estate-tail limited to *A.* and the remainder in fee limited to his right heirs, makes no difference; because, notwithstanding the mean remainder, the word [heirs] is a word of limitation of estate, and the fee-simple vests in the ancestor. 1 Inst. 22. b. 319. b. And if *A.* had survived the testator,

the remainder in fee would have vested in him; and therefore it is within the reason of *Bret* and *Rigden*'s case; and the rule laid down in 1 Co. 94. *Shelley*'s case, (*viz.*) whether the limitation to the right heirs be mediate, or immediate, yet where the ancestor has before an estate for his life, the heirs shall take by descent (*a*) and not by purchase.

And thus has the law been (*b*) long clearly settled as to this point, even ever since *Bret* and *Rigden*'s case. But on this occasion I have been the larger in delivering the judgment of the court, because of some (*c*) late endeavours to invalidate this rule, which, by the way, may make it proper to observe, that the *altering settled rules concerning property, is the most dangerous way of removing land-marks.*

(*a*) Ante, 371. Hayter *v.* Rod.

(*b*) Vide Moor, 353. Cro. Eliz. 422.

(*c*) Vide Lord Lansdowne's Case in B. R. Mich. 1712. and that of Hutton *v.* Sympson & ux. 2 Vern. 722. Pre. Cha. 439.

Devise to *A.* for life, remainder to *B.* for life, remainder to the right heirs of *A.* and *A.* dies in the testator's life-time; his right heirs shall never take.

But then, with respect to this remainder in fee, limited to the heirs of *A.* it has been urged, that though the rule of law be certain, that whenever an ancestor takes an estate for life, and afterwards a limitation is to his heirs, in such case his heirs cannot be purchasers; yet in this case, *A.* dying in the life-time of the testator, *A.* himself never took, but the devise to him was void, and therefore, his right heir may take by purchase, like the case, where a feoffment is made to the use of *A.* for life, remainder to *B.* in tail, remainder to the right heirs of *A.*, and *A.* is dead at the time of the feoffment, the right heirs of *A.* shall, notwithstanding, take the remainder in fee; and Co. Litt. (sect. 578.) was cited to prove, that a particular estate, and a remainder may continue distinct in the same person.

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But to this the answer is, that the construction of the will must be according to the import and meaning of the words at the time of making of the will, which, in the present case, was plainly to devise a fee-simple to the ancestor, and it would be wrong to interpret it according to any accident *ex post facto*, as here, the dying of the devisee in the life-time of the devisor; and as to the case put of the feoffment, it seems, that the remainder in fee would be void, because there was no such person as *A. in rerum naturâ*, and it is all one, as if the limitation had been to *A.* and his heirs, and there had been no such person as *A. in esse*.

So here, the devise to *A.* and then (by way of remainder after a mediate estate) to the heirs of *A.* seems all one as if it had been to *A.* and his heirs, by one limitation, and that *A.* had been then dead.

Judgment for plaintiff against the will.

CASE 109. **WINGRAVE *versus* SIR RICHARD PALGRAVE.**

LORD CHANCELLOR COWPER.

Term raised to secure daughters portions. Trust thereof declared, that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso, that if the husband should die without leaving a daughter living at his death, then the term to cease. There is no issue male by the marriage; but there is a daughter who attains twenty-one and marries. Mother dies, and daughter dies in father's life-time leaving issue; her husband administers to her, he shall have no portion. (*z*)

SIR *John Palgrave*, upon the marriage of his son *Augustine* (afterwards Sir *Augustine Palgrave*,) with *Barbara Gascoin*, settled divers manors and lands on *Augustine Palgrave* for life, remainder to his first and every other son by *Barbara*, in tail male successively, remainder to trustees for ninety-nine years, remainder to Sir *John Palgrave* in fee.

2. Rep. Hyl. 582. 3. Rep. & Ca. 282.

The trust of the term of ninety-nine years is declared to be, that if *Augustine Palgrave* shall die without heir male of his body by *Barbara*, and *leaving a daughter, or daughters;* that then such daughter or daughters shall have 3000*l.* if but one, if more, 3000*l.* amongst them, payable at their ages of twenty-one or marriage, with a proviso, that if *Augustine Palgrave* shall not have any daughter by *Barbara; living at his death*, then the ninety-nine years' term to cease.

Augustine Palgrave had issue by this marriage, one daughter, (*viz.*) *Elizabeth*, who, having attained upwards of the age of twenty-one years, married the plaintiff.

Barbara the mother died without issue male, or any other issue but this daughter *Elizabeth*, who has issue by the plaintiff, and *dies in her father Augustine Palgrave's life-time;* and afterwards *Augustine Palgrave* dies; and the plaintiff the husband, having administered to his wife *Elizabeth*, brings a bill for this portion.

[402]

Lord Chancellor: The plaintiff is not intitled to his wife's portion; for by the first words, the trust of the term never rises, that being to commence upon a condition precedent, (*viz.*) if *Augustine* the husband should die without heir male, and *leaving* (*y*) a daughter or daughters, which cannot be intended having had a daughter, but leaving a daughter at the time of his death, and *Augustine* the husband leaving no daughter at his death, the trust of the term does not arise.

(*z*) See *Cholmondeley* v. *Meyrick*, 1 Eden, 77. and cases cited in note p. 86.

(*y*) See *Hope* v. *Clifden*, 6 Ves. 507. *Powis* v. *Burdett*, 9 Ves. 434. *Forth* v. *Chapman*, post. 664.

WINGRAVE *v.* SIR RICHARD PALGRAVE.

Also the proviso does determine the term itself, and consequently the trust thereof must fall; for the proviso says, that this term shall determine, if *Augustine* the husband shall not have a daughter by *Barbara*, living at his death; and *Augustine* the husband not having such daughter living at his death, the term is determined; and if the term be determined at law, by the express provision of the parties, it would be very strange for equity to revive it.

The intention of the settlement might be, and probably was, that this term should cease, and that no portion should ever, in such case, be raised for the benefit of any executor or administrator, after the death of the daughter, for whose *personal advantage* this might be designed; but in case of her death in the life of the father, the intent of the parties might be, to prefer the heir of the family (who, in this case, was the defendant a son by an after-taken wife,) before any executor or administrator of a deceased daughter.

34. ch. D. 482. 2. Ru + Ch. 700.

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LONG *versus* SHORT. (1) 1894 1 Ch 693 CASE 110.

LORD CHANCELLOR COWPER.

2 Vern. 756.
1 Eq. Ca. Ab. 114. pl. 7.
2 Eq. Ca. Ab. 223. pl. 4.
One seised in fee of some lands, and possessed by lease for years of other lands, devises the fee to *A.* and the lease to *B.* and dies indebted by bond. On a deficiency of assets, both the devisees shall contribute to the payment of the bond; but if the devise to *A.* had been of all the rest of his estate, then *A.* should have paid the debts.

ONE seised in fee of some lands, and possessed of a lease for years in other lands, and being indebted by specialty and simple contract, made his will, by which he devised a rent-charge of 40*l.* a year out of the lease for years to one grandson, bequeathed the lease itself to another grandson, and likewise devised all his lands in fee to *A.* and his heirs. None of his devisees were his heirs at law, and his will was made since (*a*) the statute against fraudulent devises.

(*a*) 3 & 4 Gul. & Mar. c. 14.

(1) Reg. Lib. 1717. fol. 596. Bill by *William Long*, heir and executor of *David Long*, Esq. deceased, against several of his creditors and legatees. The testator by will of 20 *July* 1714, devised, "his two chattel estates at "*Shillingford*, and St. *George* in the "county of *Devon*, to his daughter *Joan* "*Trosse*, and 40*l. per annum* to the "defendant *Benjamin Short*, for his "life, out of his chattel estate at *Kenn*, "if his interest in it so long continued, "and 10*l. per annum* out of the same "estate to the defendant *Agnes Dyer*, "for life, and gave to the said *A. Dyer*, "the house and garden in *Kenn*, where-"in she lately lived." He then gave some pecuniary legacies, and then "devised *all* his real estates," to plaintiff for life, remainder to *Worth William Long* (plaintiff's son) in tail male, remainder to testator's grandsons *Peter*

LONG *v.* SHORT.

And there being a deficiency of assets to pay debts, the question was, whether they should be charged on the real, or leasehold estate?

Decreed by *Lord Chancellor*, 1*st*, That a devise of a rent-charge out of a term, is as much a specifick devise, as if it had been of the term itself

2*dly*, That the devise of a term for years is as much a specifick devise, as a devise of lands in fee. Wherefore, each being equally specifick devises, it would, in this case, be an equal disappointment of the testator's intent, to defeat either, by subjecting it to the testator's debts.

Trosse and *Thomas Trosse* the younger, and their heirs, and he made plaintiff sole executor. Plaintiff paid bond debts to the amount of 1757*l.* 3*s.* but there remaining a variety of other debts, and doubts arising about the application of the different assets, plaintiff filed this bill for the sake of having the direction of this court for that purpose. The decree first directed an account of the real and personal assets of the said testator, and also of all the testator's debts and the nature of them, and the personal assets to be applied in payment of debts and legacies in a course of administration, and if any personal assets had been applied in payment of specialty debts, the simple contract creditors were to stand in the place of the specialty creditors to receive satisfaction so far, &c. The decree then proceeded thus: "and as touching the chattel "leases in *Shillingford*, devised to the "said *Joan Trosse*, and the annuity of "40*l.* to the defendant *Benjamin Short* "for life, and 10*l.* *per annum* to the "defendant *Agnes Dyer* for life, issuing "out of the chattel estates in *Kenn*, "and the house and garden in *Kenn*, "being also a chattel estate devised to "the said defendant *Dyer* for her life, "which the said defendants insisted be-"ing specifically devised, were not sub-"ject to the payment of debts, unless "the personal assets and real estate of "the said *David Long*, at his death, "prove deficient, and the said plaintiff "insisting that the devise of the said "*David Long*'s real estate to him for "life with remainders (over as afore-"said) is as much a specific devise to "him as the chattel leases, &c. are to "the defendants, and being a real estate "of inheritance ought the rather to "be exempt from debts, than the chat-"tel estates, which in their nature, are "first subject to debts, and therefore "ought to be applied; his Lordship "declared that they both lie before "the court as specific devises, and "therefore if there be a deficiency of "assets to pay the said debts, such de-"ficiency ought to be paid rateably "on the chattel estates devised, and "on the annuities of 40*l.* and 10*l.* is-"suing thereout, and on the lands de-"vised to the plaintiff with remainders "over as aforesaid, and doth order that "the master do see what at the testa-"tor's death was the value of the lands "or real estate so devised (to the plain-"tiff with remainders over) out and out "considered as an inheritance, and "what at the testator's death was the "value of the estate at *Shillingford*, "for the residue of the term therein, "and of the said 40*l.* and 10*l.* an-"nuities, and to lay the said deficiency "rateably upon the same, according to "their respective values, but the de-"ficiency which is to fall in average "upon the lands of inheritance, is to "be so far only as is occasioned by "satisfaction had, or to be had of debts "by specialty, and the master is to state "what part necessarily must, and what "part most conveniently may be, sold "for that purpose."

LONG v. SHORT.

3*dly*, That since the statute of fraudulent devises, lands in fee are equally subject to debts by specialty in the hands of the devisee, as leases in the hands of the executor or legatee are to debts by simple contract at common law.

So that to prevent the disappointment of the testator's intent, the Court thought it reasonable, that the devisee of the fee-simple estate, and the devisees of the lease and annuity should each contribute (1) to the debts by specialty, in proportion to the value of the respective premisses; but that as to the debts by simple contract, if there should be not enough, over and above, to pay them, they must fall upon the leasehold premisses only. [404]

Hereupon it was objected by Sir *Thomas Powis* and Mr. *Vernon*, that the fee simple and inheritance ought to be more favoured, than any of the personal estate and leases; for that the latter had been always decreed to go in aid of the former, and therefore, in this case, the leasehold estate ought to bear all the debts by specialty, as far as it would extend.

But over-ruled by *Lord Chancellor;* for that this might utterly disappoint the testator's intention in providing for his grandsons out of the lease; though the court allowed, that if the devise had been to *A.* of all the rest of the testator's lands, this had been a residuary (not specifick) devise, (2) and the person taking thereby, should not have come in, till after the debts by specialty, or otherwise, had been paid out of his inheritance.

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(1) See more of Contribution and Marshalling Assets in *Clifton* v. *Burt*, post. 678. *Haslewood* v. *Pope*, post. Vol. III. 322. (*z*)

(2) Quære, for every devise of land is specific, *Forrester* v. *Lord Leigh*, Amb. 171.

(*z*) And see *Howel* v. *Price*, ante 294, note 1. *Silk* v. *Prime*, 1 Dick. 384. 1 Bro. C. C. 138.

DRURY *versus* SMITH.

CASE 111.

LORD CHANCELLOR COWPER.

A. Had a nephew, and being about making his will, directed the scrivener employed by him for that purpose, to give 100*l.* to his nephew; afterwards the testator, recollecting that

2 Eq. Ca. Ab. 575. pl. 3.

One by will disposes of his personal estate, and afterwards by parol gives 100*l.* bill to one, to deliver over to his nephew, if the testator should die of that sickness; such gift decreed good. (1)

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(1) Vide *Jones* v. *Selby*, Pre. Cha. 300. *Lawson* v. *Lawson*, post. 441. *Mu-*

DRURY v. SMITH.

his nephew had 100*l.* of his in his hands, therefore ordered the scrivener not to put the legacy into his will, in regard his nephew had already that 100*l.* in his own hands, and the testator made *B.* (that was his niece) executrix and residuary legatee.

[405] Afterwards the nephew came, and brought a specie bill for this 100*l.* to the testator, who, in his last sickness, gave the said 100*l.* bill to be delivered over to his nephew, in case he [the testator] should die of that sickness, which did accordingly happen.

And now, on the nephew's bringing a bill against the executrix, for this 100*l.* note, it was objected, that this being a parol gift, and contrary to the will, by which the executrix was made a residuary legatee, it would introduce all the inconvenience of perjury which the statute of frauds intended to prevent, if such evidence, or verbal dispositions, should prevail against the will, and would be contrary to the words of the (*a*) statute, which say, a will in writing shall not be revoked by parol.

(*a*) Sect. 22.

Lord Chancellor: The case is not so strong, as if this very 100*l.* note had been specifically devised; for devising the *residuum*, is only the rest of his estate, that he should not, by will, or otherwise dispose of; but this is a gift in the testator's life-time, *donatio causâ mortis*, and the possession transmuted, and certainly, notwithstanding the will, the testator had a power to give away any part of his estate in his life-time; he might in his life-time, after the making of his will, give away any part of his estate *absolutely*, and by the same reason might, notwithstanding the will, give away any part thereof *conditionally*; and this gift being so fully proved:

[406] Decree the plaintiff his 100*l.* bill with costs.

1911. 1. Ch. 208.

Memorandum, in the case of *Smith* v. *Casen*, 8th Dec. 1718,) the Master of the Rolls, where jewels were given by the testator by way of *donatio causâ mortis*, doubted, whether this was good against debts. And it seems not; they being given in case of the donor's death, and in nature of a legacy, which therefore would be fraudulent as against creditors. (*z*)

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ler v. *Miller*, post. Vol. III. 356. *Snellgrove* v. *Bailey*, 3 Atk. 214. *Ward* v. *Turner*, 2 Vez. 431. v. *Tynte*, Amb. 318. *Hill* v. *Chapman*, 2 Bro. C. C. 612. *Hassell*

(*z*) So *Tate* v. *Hilbert*, 2 Ves. jun. 119.

BISHOP OF WINCHESTER *versus* KNIGHT.

CASE 112.

LORD CHANCELLOR COWPER.

2 Eq. Ca. Ab. 226. pl. 7. Lord of a manor may bring a bill for an account of ore dug, or timber cut, (*z*) by defendant's testator; otherwise of plowing up meadow or ancient pasture, or such torts as die with the person. (*y*)

ONE held customary lands of the Bishop of *Winchester*, as of his manor of *Taunton-Dean* in *Somersetshire*, in which lands there was a copper-mine that was opened by the tenant, who dug thereout, and sold great quantities of copper ore, and died, and his heir continued digging and disposing of great quantities of copper ore out of the said mine.

The Bishop of *Winchester* brought a bill in equity against the executor and heir, praying an account of the said ore, and alledging, that these customary tenants were as (*x*) copyhold tenants, and that the freehold was in the Bishop, as lord of the manor and owner of the soil, and that the manner of passing the premisses was, by surrender into the hands of the lord, to the use of the surrenderee.

On the other side it was said, that it did not appear the admittance, in this case, was to hold *ad voluntatem domini secundum consuetudinem, &c.* without which words [*ad voluntatem domini*] it was insisted, there could be no (1) copyhold, as had been adjudged (*a*) in Lord C. J. *Holt*'s time.

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(*a*) Salk. 365. Crowther v. Oldfield; and Carth. 432. Gale v. Noble.

Then, as to the ore dug in the ancestor's life-time, there was no colour to ask relief; because this being a personal tort, the same died with the person, and that with respect to the ore dug in the heir's own time, there could be no remedy; for that these customary tenants were as freeholders, and there was full proof, that they, from time to time, had used to cut down and fell timber from off the premisses, and had also dug stone and sold it.

Lord Chancellor: It would be a reproach to equity, to say, where a man has taken my property, as my ore (2) or timber,

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(1) Vide Harg. Co. Litt. 59. b. note 1.

(2) In *Jesus College* v. *Bloome*, 3 Atk. 262. and Amb. 54. S. C. Lord *Hardwicke* dismissed a bill for a *mere account*

(*z*) But an action will not lie in such case, *Utterson* v. *Vernon*, 3 T. R. 549. *Williams* v. *Breedon*, 1 Bos. & Pul. 330.

(*y*) But see *Garth* v. *Cotton*, 3 Atk. 751, 1 Dick. 215. *Hambly* v. *Trott*, Cowp. 371. *Lansdowne* v. *Lansdowne*, 1 Mad. 138. *Wheatley* v. *Lane*, 1 Saund. 216. note 1. *Adair* v. *Shaw*, 1 Sch. & Lef. 243. *Hardwicke* v. *Vernon*, 4 Ves. 418.

(*x*) See *Stephenson* v. *Hill*, 3 Burr. 1273.

BISHOP OF WINCHESTER *v.* KNIGHT.

and disposed of it in his life-time, and dies, that in this case, I must be without remedy.

It is true, as to the trespass of breaking up meadow, or ancient pasture-ground, it dies with the person; but as to the property of the ore or timber, it would be clear even at law, if it came to the executor's hands, that trover would lie for it; and if it has been disposed of in the testator's life-time, the executor, if assets are left, ought to answer for it; but it is stronger in this case, by reason that the tenant is a sort of a fiduciary to the lord, and it is a breach of the trust which the law reposes in the tenant, for him to take away the property of the lord; so that I am clear of opinion, the executor (1) in such case is answerable.

As to the evidence that the tenant might do one sort of waste, as to cut down and dispose of the timber, this might be
[408] by special grant; but it is no evidence that the tenant has a power to commit any other sort of waste, (*viz.*) waste of a different species, as that of disposing of minerals; but a custom impowering the tenants to dispose of one sort of mineral, as coals, may be an evidence of their right to dispose of another sort of mineral, as lead out of a mine.

But this question being doubtful, and at law, let the Bishop bring his action of trover as to the ore dug and disposed of by the present tenant.

Accordingly this was tried, and there never having been any mine of copper before discovered in the manor, the jury could not find, that the customary tenant might by custom dig and open new copper-mines (*y*); so that upon the producing of the *postea*, the Court held, that neither the tenant without the licence of the lord, nor the lord without the consent of the tenant (*x*), could dig in these copper-mines, being new mines.

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of timber cut down, as being the proper subject of an action at law, but his Lordship added that there were many instances where the court have decreed an account in the case of *mines* which they would not have done in the case of *timber*; (*z*) because the digging of mines is a sort of trade.

(1) Vide *Jesus Coll.* v. *Bloome*, Amb. 54. *Curtis* v. *Curtis*, 2 Bro. C. C. 620.

(*z*) See his lordship's observations on that case in *Garth* v. *Cotton*, 1 Dick. 211. And see *Lee* v. *Alston*, 1 Bro. C.C. 194. *Pulteney* v. *Warren*, 6 Ves. 73. *Lansdowne* v. *Lansdowne*, 1 Mad. 116. and note (z) to *Whitfield* v. *Bewit*, post. Vol. II. 241.

(*y*) See *Curtis* v. *Daniel*, 10 East, 273.

(*x*) See *Bourne* v. *Taylor*, 10 East, 189. *Whitechurch* v. *Holworthy*, 19 Ves. 213. 4 M. & S. 340. *Grey* v. *Northumberland*, 13 Ves. 236. 17 Ves. 281.

CHANCEY'S CASE. (1)

CASE 113.

At the Rolls.

10 Mod. 399. 2 Eq. Ca. Ab. 354. pl. 18. One being indebted to his servant for wages in 100*l.* gives her a bond for this 100*l.* as due for wages, and afterwards by will gives her 500*l.* for her long and faithful services. This is not a satisfaction for the bond.

ONE being indebted for wages to a maid-servant, who had lived with him for a considerable time, gave her a bond for 100*l.* and in the condition of the bond, it appeared to be *for wages;* afterwards the testator by his will, among other things, gave a legacy of 500*l.* to this maid-servant, and it was mentioned in the will to be given to her *for her long and faithful services.* The maid-servant having, on her master's death, possessed herself of divers goods that were his, the plaintiff *Chancey,* who was the executor, brought his bill against her for an account, but paid to her the 100*l.* and interest secured to her by the bond.

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For the defendant it was objected, that she should have both the money due on the bond, and also the legacy; for the legacy was a further reward for her services, and intended to be a gift *in toto:* whereas if the bond were to be taken out of it, it would be only a gift of 400*l.* and as to the old notion, that the testator must be just, before he is bountiful, that was nothing, where the testator had wherewithal to be both just (*a*) and bountiful.

3. Bear. 327. 4. Ru. & Cr. 96. 1. Eq. 385.

(*a*) Salk. 155.

Besides, that this was not insisted upon by the bill, so that the defendant had no notice or warning to prove, that the testator intended to give her the full legacy of 500*l.* over and above the bond: which proof (though by parol only) had yet been frequently admitted. (*z*)

Also, for that it appeared the executor himself had paid the bond, and taken a receipt for it.

Master of the Rolls: It is sufficient that it appears the creditor has a greater legacy given her, and the plaintiff the executor prays relief, which is as much as if he had prayed, that he might not be compelled to pay both the debt and legacy.

This is stronger than the usual case; for the bond is *for service,* and the 500*l.* legacy is *also for service;* so that it is a greater reward and satisfaction for the same thing; neither is

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(1) *Chancey* v. *Wootton, et è contra,* Reg. Lib. A. 1724. fol. 449.

(*z*) *Wallace* v. *Pomfret,* 11 Ves. 542. *Petit* v. *Smith,* ante, 9.

CHANCEY'S CASE.

it material that the executor has paid it, for he was bound to pay the bond at law, and his only method is, to stop it out of the legacy; but clearly, such a legacy is not a satisfaction for service done to the testator (*a*) after the making of the will.

(*a*) Vide Salk. 508. & post. Vol. II. 343. Vol. III. 355.

This decree was afterwards (*b*) reversed by Lord Chancellor *King*, upon which occasion his Lordship said, he was not for breaking in upon any (1) general rule, though he did not see any great reason, why, if one owed 100*l.* to *A.* by bond, and should afterwards give him a legacy of 500*l.* this legacy must go in satisfaction of the debt; for if so, the whole 500*l.* would not be *given*, in regard 100*l.* of it would be *paid* towards a just debt which the testator could not help paying; and therefore the whole 500*l.* would not be given, against the

(*b*) Trinity, 1725.

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(1) The strict rule is established, that a legacy given by a debtor to his creditor which is equal or greater than the debt, shall be presumed to be intended in satisfaction of the debt. *Talbot* v. *Duke of Shrewsbury*, Pre. Cha. 394. *Jeffs* v. *Wood*, post. Vol. II. 132. *Fowler* v. *Fowler*, post. Vol. III. 353. *Reech* v. *Kennegal*, 1 Vez. 126. (though if smaller, it shall not be taken as a satisfaction *pro tanto*. *Cranmer*'s case, Salk. 508. *Atkinson* v. *Webb*, 2 Vern. 478. *Eastwood* v. *Vincke*, post. Vol. II. 616. *Minuet* v. *Sarazine*, Mos. 295.) but the latter cases, although they acknowledge the general rule to be fully established, yet express a dissatisfaction with the principle upon which it proceeds, and are anxious to collect from the *will* circumstances to rebut such presumption. So where the payment of debts is particularly mentioned, as in the present case of *Chancey*, and *Richardson* v. *Greese*, 3 Atk. 65. (but in *Gaynon* v. *Wood*, at the Rolls, 19 July 1759, where the testator by will gave to *Sarah Gaynon* a legacy of 500l. and thereby declared that, in case his personal estate should not be sufficient for payment of *all his debts, legacies, and funeral charges*, he thereby subjected all his real estates to the payment thereof, and afterwards by a codicil gave a further legacy of 500l. to the said *Sarah Gaynon*, and died indebted to *Sarah Gaynon* in 200l. on bond, which debt was contracted after making the will, but before the codicil: His Honor declared, that the 500l. given *by the codicil* was to be considered and deemed a satisfaction of the said 200l. given by the testator to the plaintiff *Sarah*. Reg. Lib. A. 1758. fol. 511.) Or, where the legacy is not equally beneficial with the debt, in some one particular (although it may be more so in another) as in *time* of payment, *Nicholls* v. *Judson*, 2 Atk. 300. *Clarke* v. *Sewell*, 3 Atk. 96. *Matthews* v. *Matthews*, 2 Vez. 635. *Haynes* v. *Micoe*, 1 Bro. C. C. 129. or in point of *certainty*. *Crompton* v. *Sale*, post. Vol. II. 555. *Barret* v. *Beckford*, 1 Vez. 519.—As to satisfaction of *actual* contracts to provide for wife, children, &c. vide *Blandy* v. *Widmore*, ante, 324. *Eastwood* v. *Vincke*, post. Vol. II. 614. (*z*)

(*z*) And see *Richardson* v. *Elphinstone*, 2 Ves. jun. 463. *Barclay* v. *Wainwright*, 3 Ves. 466. *Hinchcliffe* v. *Hinchcliffe*, ib. 529. *Tolson* v. *Collins*, 4 Ves. 483. *Plume* v. *Plume*, 7 Ves. 258. *Wallace* v. *Pomfret*, 11 Ves. 542. *Chave* v. *Farrant*, 18 Ves. 8.

express declaration of the testator, who says he *gives* the same ; and though it seemed to have obtained as a rule, that a man should be just before he is bountiful, yet when a man left such an estate and fund for his debts and legacies, as that he might thereout be both just and bountiful, and especially, when there seemed to be not only *an intention*, but also *express words* to that purpose, in such case his Lordship did not see, but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides.

And it was said at the bar, by Mr. *Talbot*, to have been a strange resolution, that if I owe a man 100*l.* and give him 100*l.* legacy, then I give him nothing, but only pay him what I am bound to do ; but if the legacy be twenty shillings less, (*viz.*) 99*l.* here it is a good gift and legacy, exclusive of the debt.

However, the Court said, they were not by this resolution, overturning the general rule : but that this case was attended with particular circumstances varying it from the common case, (*viz.*) that the testator, by the express words of his will, had devised "that all his debts and legacies should be paid ;" and this 100*l.* bond being then a debt, and the 500*l.* being [411] a legacy, it was as strong, as if he had directed that both the bond and legacy should be paid ; that when the testator gave a bond for the 100*l.* arrear of wages, it was the same thing as paying it ; and as, if he had actually paid it, and had afterwards given the legacy of 500*l.* the executor could not have fetched back the 100*l.* and made the defendant refund, so neither should the bond in this case be satisfied by the bequest of the legacy.

His Lordship also observed, that the executor (the plaintiff Mr. *Chancey*) did not himself take this 500*l.* legacy to be a satisfaction for the bond, as appeared by his having voluntarily paid the 100*l.* to the defendant, and that his Lordship was of the same opinion.

So the decree at the Rolls was reversed, and the defendant (the maid-servant) had both her debt and legacy.

CASE 114. ANONYMOUS.

Where equity will give leave to file an original, and where not.

UPON a petition to the Master of the Rolls, for leave to file an original, after a writ of error brought to reverse a judgment, his Honor, having taken time to consider of it and likewise of another case, where, upon a judgment by confession, the Court gave such leave, and having spoken with Mr. *Hetherington* (an ancient officer of the court), at length denied leave to file the said original, saying, that where a judgment is given by confession, as the defendant, in such case, consents that there shall be judgment awarded against him, so does he likewise, by implication, consent to all those means without which the judgment cannot be effectual, and consequently, that an original shall at any time be filed, especially if such judgment was given as a security for money, or other valuable consideration. But that it is otherwise where judgment is given by default, or on demurrer, &c. and that there is also a difference where the omission proceeds from the ignorance or nescience of the clerk, and where it is by mistake or misprision, for in the (*a*) former case it is not to be helped; and such leave to file an original as aforesaid, ought not to be given, without very special reason; for this would be a wrong to the crown, and to the officer, no originals being then likely to be filed, unless where the party should find himself in danger of having his judgment reversed.

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(*a*) Vide Blackamore's Case, 8 Co. 159. a. b.

The court further declared, that they were the rather induced to deny leave to file an original, in the principal case, in regard, if this judgment were reversed, (it being upon a policy of insurance,) the plaintiff might begin a new action. *Secus*, had it been in a *quare impedit*, or in action against the hundred for a robbery, where the suit must be commenced within a † limited time; or if the time had been so far elapsed, as that the statute of limitations had been a bar, if the judgment should be reversed.

Afterwards in *June* 1719, in another cause on a petition to the Master of the Rolls for leave to file an original, upon affidavit that the plaintiff's attorney had been ill, and disordered in his head, by which means an original was omitted

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† Vid. 3 Lev. 347. *Beachcroft* v. *The Hundred of Burnham*, where for this reason, (*viz.*) because the time for bringing the action was elapsed, the Court gave leave to amend after issue was joined, and the jury had appeared at the bar.

to be filed; and a writ of error being brought, in this case, to reverse the judgment for want of such original, in which writ of error bail was given: ANONYMOUS.

Cur': Take leave to file the original, but pay the costs of the writ of error hitherto, and let the bail in the writ of error be discharged. (1)

(1) Vide *Anon.* post. Vol. III. 314. *Pengree* v. *Jonas*, 2 Bro. C. C. 141. (*z*)

(*z*) *Massingburn* v. *Durrant*, 2 Vent. 49. *Chase* v. *Etherege*, ib. 130. *Hole* v. *Finch*, 2 Wils. 393. *Carr* v. *Shaw*, 7 T. R. 299.

DE TERM. PASCHÆ, 1718.

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COPELAND *versus* STANTON.

CASE 115.

A Witness on the part of the defendant was sworn, and having appeared before the examiner, was examined to several interrogatories, after which he was appointed by the examiner to come another day, but the next morning was suddenly taken ill, and died.

2 Eq. Ca. Ab. 417. pl. 4. Where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of.

Upon which, I moved the Master of the Rolls, that this witness's depositions, so far as they were taken, might be made use of, which, without the order of the Court, could not be, the witness not having signed his examination.

But his Honour, having advised with Sir *Thomas Geery*, the Master then in Court, denied the motion, for that the examinations were imperfect, and could not be made use of.

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It seems, after the witness is fully examined, the examinations are read over to him, and the witness at liberty to amend or alter any thing, after which he signs them, and then (but not before) the examinations are compleat, and good evidence.

COPELAND v. STANTON.

But yet where the defendant, after publication, examined a witness, and on the usual affidavit that the defendant, his clerk or solicitor, had not seen the depositions, got an order to re-examine this witness, but the witness died before a re-examination, the Court gave leave to the defendant to make use of the former depositions of the same witness. (z)

In *Michelmas* term 1722, in the case of *Debrox* v. ——— the defendant, after an order for publication, examined a witness, and then first conceiving himself irregular in examining this witness (it being after publication) got an order (upon petition and an affidavit from himself, his clerk in court and solicitor, that they had not, nor would see any of the depositions) that he might re-examine the said witness; but before there could be a re-examination of this witness, he died; and upon affidavit of this,

Lord Chancellor Parker ordered, that the defendant might make use of the depositions taken of this witness, the re-examination of him having been prevented by the act of God.

(z) See *Hamond* v. ——, 1 Dick. 50. *Jones* v. *Donithorne*, ib. 352. *Mulvany* v. *Dillon*, 1 Ba. & Be. 411. *Cazenove* v. *Vaughan*, 1 M. & S. 8. *Cholmondeley* v. *Clinton*, 2 Mer. 81.

CASE 116.

TRAFFORD *versus* ASHTON.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 641. pl. 8. Trust of a term to raise portions out of rents and profits, to be paid as soon as conveniently may be.

SIR *Ralph Ashton* seised in fee of a great real estate in *Lancashire*, upon his marriage, settled the same upon himself for life, remainder to his wife for life, remainder to trustees for ninety-nine years, remainder to his first, &c. son, remainder to the first and every other son of his brother *Richard Ashton*, in tail male successively.

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By virtue of the word (profits) trustees may sell or mortgage; *secus*, if said annual profits.

The trust of the term of ninety-nine years was declared to be, that if Sir *Ralph Ashton* should die without issue male by the said marriage, and should leave one or more daughters, then the trustees should, *out of the rents and profits*, raise 8000*l.* for the daughters of that marriage, to be paid them as *soon as conveniently could be*, without limiting any express time when the portions were payable; but then a further trust of the term was declared, that if there should be a son and a daughter or daughters by the marriage, in such case, the trustees should, as soon as possible, raise 1000*l.* a-piece for the daughters, payable at twenty-one or marriage.

This term of ninety-nine years was not made without impeachment of waste.

Sir *Ralph Ashton*'s lady dies first, afterwards Sir *Ralph* dies without issue male, and leaving three daughters (the plaintiffs) all married, and the remainder in tail becomes vested in the defendant his nephew, the present Sir *Ralph Ashton*.

The questions were, *first*, Whether this 8000*l.* should be raised otherwise than out of the yearly rents and profits, or by sale or mortgage?

And 2*dly*, Whether it should carry interest, and from what time?

For the defendant it was said, that it was well known the three daughters had a very great estate in land left them as heirs general of this antient family, and that it could not but be intended by the late Sir *Ralph Ashton*, that the defendant, who was to support his name and honour, who was his nephew, and whom he made as his adopted [417] son, should have wherewithal to live, and maintain the honour.

That the 8000*l.* being to be raised by rents and profits, it must be intended *yearly rents*, and *yearly profits*; and if so, it was plain there could be no sale or mortgage.

That the intention of the settlement was, to preserve the estate in the name and family, as long as might be; and consequently not to sell or mortgage, or to give any power for that purpose.

That had it been so intended, it would have been so expressed, (*viz.*) that the trustees might raise the portions by *sale* or *mortgage*, and the rather, for that this was the general way of penning settlements.

That the term of ninety-nine years not being made without impeachment of waste, this was an indication, that the trustees were so far from being invested with a power to sell any part of the estate, that they were not intrusted with cutting down a tree from off it.

That here was no certain time limited when these portions were payable, it being only said, *as soon as conveniently might be;* as soon as conveniently? That is, with convenience to the nephew, and not so as to distress *him*.

That if in some cases the word [profits] was construed to extend to the profits of the land arising by sale, if ever equity had gone so far, it must be, where an express certain time was limited; and under those circumstances, rather than not

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comply with such express limitations, and where the annual profits would not raise it by that time, the Court might con-

[418] strue the word [profits] to extend to profits by sale; but never made such construction, where no express time was appointed, and where the sum in convenient time might be raised.

That in the case of Mr. *Byde* of *Ware-Park* in *Hertfordshire*, where a portion was secured to his sister, to be raised by rents and profits, the Court did not only raise it by rents, but confined the same to so much a year, as that Mr. *Byde* might have whereupon to live out of the residue.

2*dly*, It was argued, that as to interest, where the portion was to be paid out of the yearly rents, the party must take it so; and there was no default in payment, there being no express time appointed for paying the portion; it was the plaintiffs' own fault, if they would not enter; whereas if the defendant was in no fault, he ought not to pay interest, for interest is only given in (*a*) default of payment.

(*a*) Post. 458. in the case of Butler v. Duncombe.

On the other side it was said by counsel, and so ruled by the Court, that the daughters were *purchasers* of portions, by their mother's marriage, and the marriage portion; but the limitation to the defendant, the present Sir *Ralph Ashton*, was voluntary.

That the meaning of the word [portion] was a provision for marriage, but the leisurely way of raising money by yearly rents would not answer such end.

That the words [profits of lands] especially when to pay debts or portions, implied (1) any profits that the land would yield, either by selling or mortgaging; and that this had been the constant construction in the like cases, and 2 Chan.

[419] Cases, 205. *Lingen* v. *Foley*, was cited, where lands were devised to trustees, in trust out of the rents and profits to pay debts and legacies, and the trustees decreed to sell the land

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(1) But it seems that the natural meaning of the word "profits," is "annual profits," and that the cases which have extended it further, are exceptions out of the general rule, in which the context has afforded a different construction. *Ivy* v. *Gilbert*, post. Vol. II. 13. *Evelyn* v. *Evelyn*, ib. 666. *Mills* v. *Banks*, post. Vol. III. 1. *Okeden* v. *Okeden*, 1 Atk. 550. *Small* v. *Wing*, 3 Bro. P. C. 503. (*z*)

(*z*) And see *Albemarle* v. *Rogers*, 2 Ves. jun. 477. 481. *Anon.* 1 Vern. 104. note (1). *Allan* v. *Backhouse*, 2 V. & B. 65. *Bootle* v. *Blundell*, 1 Mer. 232.

itself; as also 1 Chan. Cases, 176. where the difference is taken betwixt annual profits, and profits generally, and in which place it appears from many instances, that where daughters' portions were directed to be raised out of rents and profits, and were made payable at a fixed day, and the annual profits would not raise the portions by (*a*) that day, the Court has decreed a sale. Also the case of (*b*) *Warburton* and *Warburton* was cited.

(*a*) Pre. Cha. 586.
(*b*) 2 Vern. 420.

It was moreover insisted, that here was a certain time appointed for payment of the portions, and that implied, though not expressed; *viz.* it was said, they should be paid *as soon as conveniently might be*; now that was *presently*, for the daughters being twenty-one at Sir *Ralph Ashton*'s death, and marriageable, it was *then* convenient they should have their portions.

That though (*c*) *yearly* profits might make a difference, yet here that was not material, the word [yearly] being omitted.

(*c*) 1 Vern. 104.

That the portions being payable presently on the death of Sir *Ralph* (the daughters being then twenty-one), they consequently would carry interest, and the rather, since they were to arise out of land, which yielded yearly rents and profits. (1)

Lord *Parker* farther observed, that by the trust, if there were a son and a daughter, or daughters by the marriage, the son should pay interest to his sisters for their portions, from their age of twenty-one or marriage, and it could not be imagined that Sir *Ralph* would be kinder to his nephew in excusing him from paying interest, than to his own son, if he had one, who was bound to pay interest. Wherefore it was decreed, that the portions should be raised by sale or mortgage, as should be agreed by the Master and the parties, with interest from Sir *Ralph*'s death, and costs.

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(1) Vide *Ivy* v. *Gilbert*, post. Vol. II. 20.

CASE 117.

RATCLIFF *versus* ROPER.

LORD CHANCELLOR PARKER. If the party's clerk in court be dead, no process can be taken out against the party until he has appointed a new clerk in court, and a subpœna ad faciend' attorn. must be taken out for that purpose. (*z*)

IN this cause a decree was made for a sale of the estate for the payment of debts, and a purchaser approved of and confirmed; there was likewise an order, that all parties should join, &c.

And on affidavit that one of the parties refused to be spoke with, so as to be served with the writ of execution, though it was allowed to be a motion of course, on affidavit of this matter, that service of the clerk in court might be good service, yet where the clerk in court appears to be dead (as he did in this case) there the Court said, they would make no order, but a *subpœna ad faciend' attornat.* must be taken out and served; because, till then, the party is not in court.

It was also allowed, that the service of the *subpœna ad faciend' attorn.* would be good, if left at the house, and that though the party in this case denied himself, yet still the *subpœna* might be left at his house.

(*z*) So *Francklyn* v. *Colhoun*, 12 Ves. 2. And see *De Manneville* v. *De Manneville*, ib. 203.

2. Keen. 23.
2 Ch. Ca. 700.
11. Sim. 216.
3 Bea. 455.

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CASE 118.

MASTERS *versus* SIR HARCOURT MASTERS. (1)

At the Rolls.
2 Eq. Ca. Ab. 192. pl. 7.
322. pl. 13.
352. pl. 12.
366. pl. 7.
554. pl. 10.

MRS. *Mary Masters* by her will left several legacies to several of her relations and others; for instance, to her nieces *A. B.* and *C.* pecuniary legacies, (*viz.*) to *A.* and *B.* 200*l.* a-piece, and to her niece *C.* 400*l.* and having a mother living gave all her houshold goods, after her mother's death, to be divided among her said three nieces, and also the best of her cloaths; she likewise by her will gave several specific legacies, and to the poor of two hospitals in *Canterbury* (naming them) 5*l.* a-piece; as to her lands she devised them to her

(1) Reg. Lib. 1717. fol. 558.

nephew and heir at law, the defendant Sir *Harcourt Masters, but charged the same with the payment of her legacies abovementioned,* and made the defendant Sir *Harcourt* executor.

Afterwards her mother died, by which a considerable increase of personal estate came to her, and thereupon she made a codicil, thereby giving several pecuniary legacies to several to whom she had before given legacies by her will, many of which legacies were larger than what were given them by her will, and gave *5l. per annum to all and every the hospitals,* (without saying where the hospitals were,) and left annuities to several of the pecuniary legatees in the will, and gave to her said three nieces, *A. B.* and *C.* all (leaving a blank) to be equally divided, and her cloaths; and among her legacies which were in figures, some of them were writ so blindly (seeming to have been altered) that it was difficult, if not impossible to read them, or to distinguish what the legacies were; particularly in one place, whether 100*l.* or 300*l.* was meant; and she gave to Mrs. *Sawyer* 200*l.* when there was no such person ever known to her, but it was alledged that she meant one Mrs. *Swopper;* she likewise bequeathed to her said three nieces *A. B.* and *C.* 50*l.* a year for their lives, and left 200*l.* for a monument for her mother, after which she died.

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Her codicil happened not to be attested by any witness, and so as was admitted, could charge no land.

It was also admitted, that both her real and personal estate were deficient in value to pay the legacies and annuities given by her will and codicil.

The defendant Sir *Harcourt* proved her will and codicil, and upon a bill brought for the payment of several of the legacies to several of the plaintiffs,

1*st*, It was decreed by the Master of the Rolls, that the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not to those by the codicil, the estate should be so marshalled, that, as far as possible, the whole will might take effect, and all the legacies be paid. (1)

One gives legacies by his will, and other legacies by his codicil, and the lands are charged with the legacies in the will only, and the personal estate is not sufficient to pay all the legacies; the legacies in the will shall be charged on the land and the legacies by codicil on the personal estate.

(1) Vide *Hyde* v. *Hyde*, 3 Cha. Rep. 83. *Bligh* v. *Earl of Darnley*, post. Vol. II. 620. (*z*)

(*z*) For the general doctrine of the court as to marshalling assets, see *Clif-*

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And therefore, that the legatees in the will should be paid out of the real estate, and if that should be deficient, they must, as to the surplus, come in average with the legatees in the codicil, to be paid out of the personal estate; and, there being admitted to be a deficiency, that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not (*a*) abate in proportion; on the contrary that the (*b*) charities, though preferred by the civil law, yet they ought to abate in proportion, for they were but legacies.

(*a*) Vide post. 539. Hinton v. Pinke.

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(*b*) Vide ante, 265. Tate v. Austin, & post. 675. Att. Gen. v. Hudson.

Specific legacies not to come into average, but charity legacies that are pecuniary shall come into average, as well as other pecuniary legacies. Whether a legacy of 200*l.* given by the testator for a monument shall come into average. Qu.

But it was objected, that the two hundred pounds given for a monument for the mother, ought not to abate in proportion, this being a debt of piety to the memory of her mother, from whom the testatrix received the greatest part of her estate. And to this the Court inclined, but however reserved that point. (1)

Real estate is by will charged with the payment of the legacies abovementioned; this will not extend to the legacies in the codicil; *secus* if the land were charged with the payment of the legacies generally.

2*dly*, That the will charging the real estate with the payment of the legacies *abovementioned*, it could not (2) extend to legacies in the codicil; but if the real estate had been charged with the payment of the testatrix's legacies in general, it would have taken in the legacies in the codicil, they being as much her legacies as those in the will (3)

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(1) This point was not reserved. The decree directs, "that the whole 200*l.* "devised by the testatrix's codicil for "building a monument for her mother, "be paid and laid out accordingly;" "and afterwards "that in case the said "testatrix's personal estate shall not be "sufficient to pay all the legatees and "charities under the codicil, then such "legatees and charities, (*except the* "200*l. for the monument*) are to abate "in proportion."

(2) *Hone* v. *Madcraft*, 1 Bro. C. C. 261.

(3) *Hyde* v. *Hyde*, 3 Cha. Rep. 83. *Brudenell* v. *Boughton*, 2 Atk. 268. *Hannis* v. *Packer*, Amb. 556. *Windham* v. *Chetwynd*, 1 Burr. 423. *Jackson* v. *Jackson*. (*z*)

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ton v. *Burt*, post. 678. As to marshalling assets between legatees under a will, and legatees under a codicil, see *Norman* v. *Morrell*, 4 Ves. 769. *Austen* v. *Halsey*, 6 Ves. 475. *Bonner* v. *Bonner*, 13 Ves. 379.

(*z*) 2 Cox. 35. And see *Inchiquin* v. *French*, 1 Cox. 1. *Habergham* v. *Vincent*, 5 T. R. 95. 4 Bro. C. C. 353. and 2 Ves. jun. 204. *Buckeridge* v. *Ingram*, ib. 665. *Smart* v. *Prujean*, 6 Ves. 560. *Wilkinson* v. *Adam*, 1 V. & B. 422. 445.

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Pecuniary legacies are given by will, and afterwards greater legacies to the same persons by codicil; these no satisfaction for the legacies in the will, but the legatees to have both, because the codicil is part of the will.

3*dly*, It being objected, that whereas the pecuniary legacies in the codicil exceeded the legacies in the will, and were given to the same persons, this should be in satisfaction of the legacies in the will, and that the legatees should not have both; and particularly, that where the annuities given by the codicil were of greater value than the legacies in the will, and were given to the same persons, they should be a bar to such persons from claiming both:

Cur': The annuities by the codicil, though given to the same persons that were pecuniary legatees in the will, and though of greater value, yet shall not be taken to be a satisfaction for the pecuniary legacies given by the will; because the annuities are not *ejusdem generis*, and the annuitants might die the next day after the death of the testatrix, and nothing being more uncertain than life, consequently the latter gifts instead of being a bounty, might be a prejudice, if taken to be in satisfaction of the legacies by the will. (1)

1. Young & C. 298.

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4*thly*, The Court declared, that the codicil was part of the will, and proved as part thereof, and that the greater pecuniary legacy, given by the codicil to the same person that was a pecuniary legatee in the will, should not be taken to be a satisfaction, unless so expressed; that it was, as if both the legacies had been given by the same will (2); and it seemed

(1) Vide *Crompton* v. *Sale*, post. Vol. II. 555.

(2) There seems to have been some mistake in the report of this part of the case, for where two legacies of quantity are given *simpliciter* to the same person by the same instrument, the presumption shall be against their being intended as cumulative; otherwise, where given by different instruments. *Hooley* v. *Hatton*, 1 Bro. C. C. 390. note. *Ridges* v. *Morrison*, ib. 389. (*z*) *Foy* v. *Foy*, ib. 392. note. (*y*) In *Hooley* v. *Hatton*, Lord *Bathurst* conjectures that this passage in *Masters* v. *Masters*, is wrongly pointed, and that the semicolon, which follows the words "unless so expressed" ought to have been placed after the words "that it was" by which means the passage would stand, "should not be taken to "be a satisfaction, unless so expressed "that it was; as if both the legacies," &c. Where both legacies are given for the *same cause*, they shall not be cumulative, whether in the same or different instruments. *Duke of St. Albans* v. *Beauclerck*, 2 Atk. 640. Otherwise where one is given generally, and the other for an express cause. *Ridges* v. *Morrison*, 1 Bro. C. C. 393. but if it be collected from the context, whether the testator meant an addition to, or substitution for the first bequest, these presumptions may be rebutted. *Jackson* v. *Jackson*, ante 423. note. *Coote* v. *Boyd*, 2 Bro. C. C. 521. and indeed very slight circumstances have been

(*z*) 1 Cox, 180. (*y*) 1 Cox, 163.

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a circumstance tending to prove, that the testatrix intended additional bounties, inasmuch as she, after the making the will, and before her making the codicil, had an additional estate from her mother.

Bequest of houshold goods extends to all houshold goods purchased afterwards, and that are in the house at the testator's death.

5thly, On its being insisted, that the devise of the houshold goods to the testatrix's three nieces, could not pass those houshold goods which the testatrix had not at the making of the will, but came to the possession of afterwards, by the death of her mother, and that the codicil would not supply it; for the codicil gives all (with a blank) to her three nieces.

(*a*) Salk. 237. & post. 598. All Souls College v. Coddrington; and see the reason for this distinction, post. Wind v. Albone, 575.

Cur': The devise of all one's houshold goods will pass all houshold goods that the testator has at the time of his (*a*) death; *contra* of a devise of all one's lands, for that will pass only the lands which the testator then had. But houshold goods are always changing and perishing; and therefore the will, as to personal estate, shall relate to the time of the testator's death; otherwise it would be very inconvenient; for then a man must make a new will every day; also the codicil should, had there been occasion, have been explained by the will, though here the will is sufficient without the codicil; and as to plate, (*b*) if commonly made use of by the family, the same shall pass † as houshold goods.

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(*b*) 2 Vern. 638. Sed Vide Pre. Cha. 207. contra.

Plate in common use in a family shall pass as houshold goods.

Where the will is writ blindly, and hardly legible, and the legacies in figures, court referred it to a Master to examine what those legacies were, and the Master to be assisted with such as understood the art of writing. (*x*)

6thly, Where the will was writ blindly, and hardly legible, and as to the money-legacies writ in figures, it was ordered to

† It was formerly held, that by the devise of all the testator's furniture or household goods, plate in common use would not pass, in regard this was but *curta supellex*; but as the nation grew richer, and plate became a more common furniture, it has been construed to be included within those words. By the Master of the Rolls in the case of *Budgen* v. *Ellison et ux'*, *Paschæ* 1731. (1)

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considered as sufficient to shew a testator's intention, either one way or the other. (*z*)

(1) So *Nicholls* v. *Osborn*, post. Vol. II. 420. *Snelson* v. *Corbet*, 3 Atk. 370. *Kelly* v. *Powlett*, Amb. 605. (*y*)

(*z*) See *Hodges* v. *Peacock*, 3 Ves. 735. *Baillie* v. *Butterfield*, 1 Cox, 392. *Hurst* v. *Beach*, 5 Mad. 351, cases of cumulation: *Moggridge* v. *Thackwell*, 1 Ves. jun. 464. *Allen* v. *Callow*, 3 Ves. 289. *Barclay* v. *Wainwright*, ib. 462. *Holford* v. *Wood*, 4 Ves. 76. *Osborne* v. *Leeds*, 5 Ves. 369. *Attorney General* v. *Harley*, 4 Mad. 263, cases of substitution: and *Benyon* v. *Benyon*, 17 Ves. 34, in which case one legacy was held substitutional, others cumulative.

(*y*) *Anon.* ante 267.

(*x*) See 1 Phil. Ev. 493. 5th edit.

be referred to the Master to examine, and see what those legacies were, and he to be assisted by such as were skilled in the art of writing.

Legatee's name very falsely spelt; referred to a Master to see who was intended.

7*thly*, Likewise as to the legacy of 200*l.* to Mrs. *Sawyer*, the Master to examine, who the testatrix meant thereby, and whether the testatrix meant Mrs. *Swopper*, who was the person that contended for the same; and if the Master should find she was the person intended, then she to receive her legacy in proportion with the other legatees. (1)

One by will gives 5*l.* per annum to all and every the hospitals, and it was proved the testatrix lived in a place where there were hospitals; it shall be taken to be these hospitals, and not to extend to another hospital about a mile from thence, tho' founded by the same person.

8*thly*, As to the 5*l per annum, to all and every the hospitals*, it appearing that the testatrix lived in *Canterbury* for many years, and died there, and that she took notice by her will of two *Canterbury* hospitals, this charity was held not to be void for the incertainty, but to have been intended *for all the hospitals* (2) *in Canterbury*; but not to extend (as was pressed) to the hospital about a mile out of *Canterbury*, tho' *founded by the same Archbishop of *Canterbury*, and governed by the same statutes. And this the court decreed notwithstanding it was objected, that they ought not to go out of the words of the will and confine the general words [all hospitals] to those in *Canterbury*; and the court did this the rather, because these charities, if they prevailed, would be perpetuities of 5*l.* *per ann.* and by that means create a deficiency, and consequently in a great part defeat the rest of the will, as to plain legacies, in favour of those that are doubtful.

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9*thly*, Whereas in some part of the will it was writ *hospitals*, and in some *spittals:*

Hospitals and spittals the same.

Cur': It is the same thing; for spittal is the abbreviation of hospital, and thence come the spittal sermons.

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(1) Sed vide *Hunt* v. *Hort*, 3 Bro. C. C. 311. (*z*)

(2) Vide *Attorney General* v. *Hudson*, post. 674.

(*z*) *Abbot* v. *Massie*, 3 Ves. 148. *Norman* v. *Morrell*, 4 Ves. 769. 1 Phil. Ev. 538. 5th edit. *Beaumont* v. *Fell*, post. Vol. II. 140.

CASE 118.

HEWET *versus* IRELAND.

LORD CHANCELLOR PARKER.

Gilb. Rep. 145. 2 Eq. Ca. Ab. 139. pl. 9. Pre. Cha. 489. Provision for daughters to be born shall extend to daughters then begotten.

HUSBAND and wife have issue a daughter, and a provision is made by deed and fine, out of the estate of the wife after marriage, for securing 600*l.* in trust that she shall have the interest during her life, and afterwards in trust that the 600*l.* shall be paid to such daughter or daughters, as *shall* be begotten by the husband on the wife, such payment to be made at their ages of eighteen or marriage, which shall first happen, the interest in the mean time to go for maintenance, and if no such daughter, then to the husband.

2. Eq. 450.
39. Ch. D. 399

The fact happened to be, that at the time of the executing of this deed, there was a daughter of the marriage about ten years of age, and no *daughter born afterwards;* and the mother soon after died.

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Whereupon it was objected, that the daughter born before the making of this deed, &c. should not take; because it was said such daughters as *shall* be begotten, which are words of *futurity.*

Lord Chancellor: The parents could never intend to neglect a daughter which *was* born, and yet so young, as not to be capable of offending them, (*viz.* being but ten years old) and at the same time to take care of a daughter *to be born,* and which might never be born, and in fact never was; for which reason, if the words can bear any interpretation, the daughter born before shall take.

(a) 1 Inst. 20. b. 2 Vern. 545. 711. Pre. Cha. 491. Ante, 231. in Long v. Beaumont, and Gore v. Gore, post. Vol. II. 33.

Besides, as *procreatis* takes in children *to be begotten,* (*a*) and *procreandis* includes children *then begotten,* and as the words used here, seem only to be meant for the words [begotten or to be begotten] I am of opinion, that this daughter, tho' born before, shall take; also the words [which shall be begotten] shall relate to the death of the wife, and then the daughter born before, is included under that description. (1)

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(1) So, *Hebblethwaite* v. *Cartwright,* Ca. temp. Talb. 31. (*z*)

(*z*) And see *Burdet* v. *Hopegood,* 134. *Wilkinson* v. *Adam,* 1 V. & B. post. 486. *Doe* v. *Hallett,* 1 M. & S. 422. *Trower* v. *Butts,* 1 S. & S. 181.

It is like the case in (*a*) Cro. Car. 185. and cited by Lord C. J. *Hale,* in 1 Vent. 230. where a man devised to his eldest son and the heirs of his body, after the death of his wife, and if he died, living the wife, then to the testator's second son and the heirs of his body; the first son died, living the wife, *but leaving issue,* and it was strongly urged, that his estate should cease, for that it being said *if he died, living the wife,* this explained what went before; but it was ruled by all the court, that it was an absolute estate tail in the eldest son, and as if the words had been, if he died *without issue,* living the wife. For the father could not be thought to intend to prefer a younger son before the issue of his eldest. And the construction contended for in the present case would be equally unreasonable.

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(*a*) See this case cited ante, Kentish *v.* Newman, 235.

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STAFFORD *versus* CITY OF LONDON.

CASE 119.

LORD CHANCELLOR PARKER.

A. and *B.* bring a bill to be relieved against the city of *London,* in regard *A. B.* and *C.* (who in the bill was mentioned to be dead) were joint lessees from the city of divers water-springs near *London,* at the rent of 700*l. per annum.* And the plaintiff's bill was to have several allowances out of the said rent, by reason, that the lessees were evicted as to some, and disturbed in the enjoyment of others of the said waters, by the city themselves and by others.

1 Stra. 95. 2 Eq. Ca. Ab. 1. note to pl. 3. 166. pl. 9. 244. pl. 18. Where a bill wants proper parties, it is in the power of the court to dismiss the bill sans prejudice, or to give leave to amend, paying costs.

The city answers the bill, and pending the suit, brings an action of debt against *A.* and *B.* for the rent, supposing *C.* to be dead; and to this action *A.* and *B.* plead in abatement, that *C.* was living, and ought to be made a defendant to the action; which being a plea in abatement, *A.* and *B.* made an affidavit of the truth of the fact.

And this cause now coming on, the defendants insisted upon want of proper parties, (*viz.*) that *C.* was living, and not a party to the bill, and that *C.* was a necessary party, as he was a joint lessee, and equally concerned with *A.* and *B.* and if the allowances made to *A.* and *B.* were not satisfactory to *C.* he might draw the account all over again; that *C.* could not be bound by the account, unless made a party, and bringing him before the Master would not be enough, where it appeared he was essentially and equally

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concerned with any of the other plaintiffs. *Quod curia concessit.*

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Then the question was, whether the court should give the plaintiffs leave to amend, paying the costs of the day, or dismiss the bill?

3. Atk. 110.

Cur': This is a very trick to suppose C. dead by the bill, when the plaintiffs (perhaps) could not get him to join, and yet to swear him living, upon the plea in abatement; and it being (1) discretionary in the court, either to dismiss the bill, or to give leave for an amendment on payment of the costs of the day, if in any case a bill ought to be dismissed, let it be in this; but without prejudice to another bill.

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(1) Sed vide contrà *Anon.* 2 Atk. 15. *Green* v. *Poole,* 4 Bro. P. C. 122. (*z*)

(*z*) *Jones* v. *Jones,* 3 Atk. 110. 1 Dick. 96.

4. Mu. & Cr. 574.
13. Jur. 777.
7. Sim. 116.
32. Ch. D. 539.

CASE 120.

1916, A. C. 241.

FREMOULT *versus* DEDIRE, *et è contra.* (2)

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 37. pl. 2. 257. pl. 7. One covenants before marriage to settle certain lands on his wife for life, and afterwards devises these lands for payment of debts; the covenant is a specific lien on the lands. But a covenant to settle lands of the value of 60*l.* per annum, without mentioning any lands in certain, this is no specific lien, but the wife must come in as a creditor in general, and the Master to value her estate for life, and the wife to come in for that valuation. But the wife to have the arrears before incurred, as well as the valuation of her estate for life.

THERE were several demands of several natures affecting the estate of the testator *Abraham Dedire*; he owed debts by bond and by simple contract, and upon his marriage had covenanted to settle his lands in *Rumney Marsh,* and also lands that should be of the value of 60*l. per annum,* upon his wife for her life; after which he makes a will, thereby charging all his estate real and personal with the payments of his debts, and dies, leaving his eldest son executor.

On a bill brought by the creditors for the satisfaction of their several debts, *Lord Chancellor* said, with regard to the lands in *Rumney Marsh,* the marriage articles, being a specific lien upon them, make the covenantor, as to them, but a

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trustee, and therefore, during the life of the wife, they are not to be affected by any of the bond debts. (3)

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(2) Reg. Lib. A. 117. fol. 495. (3) So, *Finch* v. *Earl of Winchelsea,* ante, 277.

FREEMOULT v. DEDIRE.

But the covenant for settling lands of the value of 60*l. per annum* on the wife for her life, does not specially bind any lands; wherefore, as touching that, the wife must come in only as a specialty creditor with the other specialty creditors. (1) And in order to settle the *quantum* of this demand, let the Master set an estimate on the wife's estate for life, (*viz.*) at so many years' purchase, and then the wife to come in as a creditor by specialty, for so much money. But in regard the 60*l. per annum* was in arrear for two years at the time of the hearing of this cause, she must come in as a creditor for 120*l.* for these two years' arrears, besides the value of her estate for life.

And though it was objected, that the Master ought to value what her life-estate was worth at the time of her husband's death, yet the court over-ruled this; for these two years' arrears were a debt actually due to her, and must in all events be paid, and she ran the hazard of a fall of her life in the mean time, and if her life had dropped, there must have been no valuation; and so it was said to have been ruled on debate in one *Berrisford*'s case, in Lord *Harcourt*'s time.

One devises his lands for payment of his debts; bonds and simple contract debts shall be paid equally. But if he only charges his lands with the payment of his debts, so that the lands descend subject to the debts, the bonds shallbe preferred before the simple contract debts.

Also it being submitted to the court, that forasmuch as in this case the lands were not devised to be sold for the payment of debts, but permitted to descend charged with the debts, and consequently were legal assets by descent as to the bond creditors, and charged only in equity by the will as to simple contracts, whether the bond creditors should not be preferred to those by simple contract?

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But if the heir sells the land before the action brought, then both to be paid equally. By the statute of fraudulent devises, a will for payment of debts, or younger children's portions, according to an agreement before marriage, shall be good.

By *Lord Chancellor:* As this case is, they shall, but if the heir before any action brought had sold the lands, and then the creditors by bond had brought their actions, they should have been paid only their share out of the assets. And it is observable, that by the express words of the statute of 3 & 4 W. & M. cap. 14. "where there is any devise or appointment by "a will of lands for payment of debts, or children's portions "according to an agreement before marriage, other than the "heir at law, such will shall be of force." (2)

Then it was contended, that these marriage articles were made in *Holland*, and that by the law of *Holland*, such articles take place of any other debts, wherefore they should be here construed according to the law of *Holland*, where they ap-

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(1) So, *Williams* v. *Lucas*, 2 Cox, 160.

(2) See the distinctions taken between legal and equitable assets in *Deg* v. *Deg*, post. Vol. II. 415.

FREEMOULT v. DEDIRE.

peared to have been made, which was said to have been held in the case of (*a*) *Feaubert* and *Turst*.

To which it was answered, and so ruled, that it ought to have been proved in this cause what is the law of *Holland*, as in the cause of *Feaubert* and *Turst*, it was proved what was the law of *France*, without which proofs our courts cannot take notice of foreign laws.

(*a*) Pre. Cha. 207. (1)

Laws and customs of France or Holland must be proved, else the court cannot take notice of them. (*z*)

(1) And 1 Bro. P. C. 38. S. C.

(*z*) *Glover* v. *Strothoff*, 2 Bro. C. C. 33. *Ganer* v. *Lanesborough*, Peake's N.P.C. 17. 4 Taun. 367. *Ex parte Cridland*, 2 Rose 166. 3 V. & B. 99. And see *Le Cheminant* v. *Pearson*, 1 Evans's Stat. 167.

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CASE 121.

TARGET *et al' versus* GAUNT *et al'*.

LORD CHANCELLOR PARKER.

ONE possessed of a term for years devised it by his will to his son *Henry* † *for his life, and no longer, and after his decease to such of the issue of the said* Henry, *as* Henry *by his will should appoint;* and in case *Henry* should die without issue, then the testator devised the same to his brother *Albinus* for the residue of the term, and died.

1 Eq. Ca. Ab. 193. pl. 11. Gilb. Rep. 149. 10 Mod. 402. Termor devises the term to *A.* for life, remainder to such of his issue as he shall appoint, and if *A.* die without issue, remainder to *B.*: this is a good devise to *B.*

1. Y. & C. 497.
1. Hare. 430.
2. — . 17.
2. Russ & Myl. 405.
8. Sim. 23.
3. Mc & Cr. 140.

Henry died without issue living at his death; whereupon The question was, whether the term should go to the executors of the first testator, or to the executors of *Henry*, or to *Albinus*?

Object. The devise over of a term upon a death without issue, is void, being too remote an expectancy, and tending to a perpetuity.

Lord Parker: The expression of dying without issue, has two senses: (*a*)

1*st*, A vulgar sense, and that is, dying without leaving issue at the time of his death.

(*a*) Vide ante, 199. Nichols v. Hooper, post. 564. Pinbury v. Elkin, and Forth v. Chapman, 666.

† *Note;* The words which are in *Italic*, are all omitted in the Register Book, though they are inserted in all the cotemporary reports of this case, and seem here to be the principal foundation of the decree.

TARGET v. GAUNT.

2*dly*, A legal sense, and that is, whenever there is a failure of issue.

And if this will be taken in a vulgar sense, (*viz.*) if *Henry* dies without leaving issue at the time of his death, then the devise over to *Albinus* is good; now this seems to be the meaning of the testator in the principal case; for it must be intended *such issue* as he should, or at least might appoint the term to, which must be intended *issue then living;* and this construction shall be the more favoured, in regard it supports the will, whereas the other destroys it. (1)

Therefore the Court held, that the devise over of the term to *Albinus* was good, and observed, that there was a great diversity betwixt a devise of a freehold estate for life, and if *A.* dies without issue, then to *B.* and a devise of a term in the same words; for in the former case this might give *A.* an estate-tail, because the words [if *A.* die without issue] in case of an inheritance, are inserted in favour of the (*a*) issue, and to let in the issue after the death of the father; but in case of a term, these words cannot have such effect, for the father takes the whole, which, on his death, will not go to his issue, but will belong to his executors.

(*a*) Vide post. 667. the case of Forth v. Chapman.

Also *Lord Chancellor* cited the case of *Lodington* and *Chime*, reported in 3 Lev. 431. which his Lordship said was in some points of it ill and mistakenly reported by Serjeant *Levinz*, tho' he himself was of counsel in it, and that this was a stronger case than the principal.

Note; Mr. *Mead* urged that if *Henry* should have issue at his death, and should make no appointment to such issue, the devise over to *Albinus* would be good. But the Court said nothing as to this.

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(1) This subject, as applied to terms for years, is more particularly considered in *Atkinson* v. *Hutchinson*, post Vol. III. 258.

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RICHARDSON *versus* SPRAAG.

CASE 122.

At the Rolls.

2 Eq. Ca. Ab. 368. pl. 1.

TESTATRIX devised money in trust for such of her daughters, *or* daughters' children, as should be living at her son's death; some of the daughters were living at the son's death, and had children, and others of the daughters were dead, leaving children: decreed all the children as well of the living daughters as of the dead should take. (*z*)

Devise of a trust to all his daughters or their children living at the testator's son's

(*z*) See *Blackler* v. *Webb*, post. Vol. II. 383.

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death. (1) Some of the daughters were living at the son's death, and had also children, and others were dead leaving children.

Upon which the question was, whether the children of the living daughters should be let into a share under this devise, or only the children of the dead daughters as substituted in the place of their mothers.

This came on before Sir *Joseph Jekyll, Master of the Rolls,* who, after having taken time to consider of it, decreed, that all the children, as well of the living, as of the dead daughters, should come in for their shares.

The word [or] to be taken for [and].

For that the word [*or*] should be taken (*a*) for [and] otherwise the whole devise would be void for the incertainty; and that it was the same, as if the devise had been to such of my daughters, *and* their children, as shall be living at my son's death; so if the devise had been to my children *or* grandchildren, my children *and* grandchildren would have taken.

(*a*) Vide post. Vol. II. 346. Keylway v. Keylway, also 2 Vern. 388, 389.

Moreover the word [*or*] might be of use, in regard all the daughters might die in the son's life-time, and then the testatrix might not think it proper to say, daughters *and* their children, when there might not be some of each species; but [*or*] in such case would be the proper word, and that the word [*or*] is usually put for [*and*] appeared by very many (2) instances in the case of *Price* v. *Hunt* in Pollexfen's Reports, 645. the last case but one in the book. †

† It seems as if it might have been agreeable to the sense of the testatrix to have understood the devise thus: "To my daughters, and to the children of such of "them as shall be dead," &c.

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(1) "Without considering any su- "periority or eldership whatever." Reg. Lib. B. 1717. fol. 502.

(2) *Read* v. *Snell*, 2 Atk. 643. *Jackson* v. *Jackson*, 1 Vez. 217. *Framlingham* v. *Brand*, 3 Atk. 390. *Wright* v. *Kemp*, 3 T. R. 470. are some of the instances in which the words "and" and "or" have been taken for each other in order to afford a reasonable construction of a will. (*z*)

(*z*) So *Eccard* v. *Brooke*, 2 Cox, 213. *Maberley* v. *Strode*, 3 Ves. jun. 450. *Weddell* v. *Mundy*, 6 Ves. jun. 341. *Bell* v. *Phyn*, 7 Ves. jun. 458. *Prebble* v. *Boghurst*, 1 Swan. 330. *Denn* v. *Kemeys*, 9 East, 366. *Doe* v. *Jessep*, 12 East, 288. *Fairfield* v. *Morgan*, 2 N. R. 38.

REX *versus* BURRARD.

CASE 123.

Motion to supersede a writ of excommunicato capiendo, 1st. for want of addition; and 2dly, because not said the defendant was commorant in the diocese. Court disallowed both the exceptions, but inclined to think that after the writ had been issued out of this Court, and then brought into B. R. and there delivered to the sheriff, but not yet actually returned into B. R. this Court, on a plain error appearing, may supersede or quash it. (1)

THE defendant was excommunicated for not paying (*y*) his proportion of a rate made for repairing the church of *D*, in *Suffolk*.

1. Mylt & Cr. 252.

And it was moved by Sir *Edward Northey*, *Attorney General*, to supersede this writ, 1st, for that it was not shewn, that the defendant was commorant within the diocese at the time of the excommunication pronounced. Moor, 467. T. Jones, 89.

2*dly*, Because there was no addition of the defendant in the writ.

On the other side it was answered (as to the first objection) that the defendant in the libel was said to be of *D.* in *Suffolk*, which was the same parish where the church was, and it should not be intended that, after the libel, he removed from thence; but if he did remove, his flying from the process of the Court which had a proper jurisdiction, should not mend his case, for then the party, by his own act, and by his turning his back upon justice, might avoid such proceedings.

3*dly*, As to the want of an addition, this was said to be only requisite in the causes of excommunication mentioned in the statute of the 5th Eliz. chap. 23. for which reason, it was true, that for want of an addition there could be no proceeding against him, by way of proclamations with pains and penalties for not appearing, but still, as the matter was [436] plainly of ecclesiastical cognizance, (*viz.*) the repairing of a church, the excommunication was good, and so was Cro. Car. 196, *Hughe*'s case. T. Jones, 89, The Inhabitants of *Bermondsey*. Sir Bartholomew Shower's Reports, 16. *Johnson*'s case. Salk. 293, *The King* v. *Fowler*.

Lord Chancellor called for the writ; and it appearing by the indorsement thereon, that this writ issued out of chancery, and, according to the statute of the 5th Eliz. was returnable in the King's Bench, and though not yet actually returned,

(1) Vide *Trebec* v. *Keith*, 2 Atk. 498. Ex parte *Little*, 3 Atk. 479.

(*y*) By St. 53 G. 3. c. 127. Excommunication is now discontinued except for offences of ecclesiastical cognizance.

REX *v.* BURRARD.

had been brought into the King's Bench, and by that court delivered to the sheriff, for this reason Lord Chancellor doubted, whether, though the writ were not returned, yet forasmuch as the Court of King's Bench was possessed of it, the Chancery could supersede this writ; and at first his Lordship inclined that it could not, but afterwards seemed to alter his opinion, and this, in regard of the great mischief which might follow, if the writ *excommunicato capiendo* should issue out in the long vacation, when the King's Bench does not sit; and it would be hard that there should be a failure of justice, and the party continue in prison, and without remedy, as he would do, if, in such case, the Chancery could not, on a plain error, supersede or quash the writ, which he therefore the rather inclined † might be done before the return of it. However, his Lordship would declare no opinion upon this; but the other exceptions against the writ being disallowed, the order which was made for superseding the writ *nisi*, was discharged.

† And this in fact was done in Trin. Term, 1727, by Lord *King* in the case of *Barlow* v. *Collins*, where the writ *excom. cap.* was for not paying costs in a cause in a spiritual Court for non-payment of tithes and *other ecclesiastical duties*, which being ill for uncertainty, though the writ was inrolled in *B. R.* yet being not returned there, to prevent a failure of justice, it was superseded in Chancery. But *quære*, whether the words above *in the long vacation* should not have been *a little before the long vacation*, for the statute of the 5th Eliz. sect. 2. expressly says, that every writ of *Excom. cap.* shall be made out in *term time*.

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DE TERM. S. TRINITATIS, 1718.

1 Eyl Ch. 255

CASE 124.

PRICE *versus* THE HUNDRED OF CHEWTON IN COM. SOMERSET.

LORD CHANCELLOR PARKER.

THE plaintiff *Price*, on the 10th of *June* 1717, went before a justice of the peace, and swore he was robbed that day about two of the clock at noon of 180*l.* and on the 9th of

2 Eq. Ca. Ab. 779. pl. 2.

Instructions for an original against an hundred for a robbery were brought to the cursitor within the year, but the writ passed the great seal after the year, though tested within the year, (viz.) when the instructions were brought to the cursitor: this held good, being warranted by the practice of the cursitor's office.

PRICE v. HUNDRED OF CHEWTON.

August following sued out an original against the hundred, who appearing, the plaintiff declared upon the statute of *Winton*, after which he dropped the action, and afterwards, on the 10th of this instant *June*, sued out a new original, but the same was antedated, and made to bear *teste* the 5th of *June* instant; and the defendants produced a certificate from the cursitor, that the writ was not sealed until the 10th instant. Wherefore, as there could not be two tenths of *June* in the same year, they insisted the year was elapsed, and consequently, that the right of action was extinct by such lapse of time, and the hundred actually discharged; that it ought not to be in the power of the cursitor, by his antedating the writ, to revive the action, or to give a right to the plaintiff, which he was before legally debarred of; for which reason, it was prayed, that the original might be set aside and superseded. But

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On the other side it was answered, that the original was made to bear *teste* on the day that the instructions were brought to the cursitor, which was on the 5th of *June* instant, though it had not been actually sealed until the 10th; and that it was the constant course, to make the writ bear *teste* when the same was bespoke; that if it were otherwise, it might be an inconvenience and hardship to the suitor, who might suffer and be deprived of his right, for what he could not help; for that it was frequently impossible to get the writ sealed for a considerable time after such writ was bespoke, and even drawn up by the cursitor.

Lord Chancellor: Let this be referred to the principals and assistants of the cursitors' office, to certify what has been the usage and custom in these cases, and to search precedents in relation thereto, and in the mean time, let all proceedings stay.

In obedience to this order, the principals and assistants of the society of cursitors soon after (*a*) made their certificate, and thereby certified it to be the constant practice of their office, "to *teste* original writs against hundreds, corporations, "heirs, and in several other cases, the same day the writs are "bespoke and that they never knew it otherwise, or that the "practice was ever contested before the present case."

(*a*) 18 July following.

Upon which it was ordered, that the said plaintiff might be at liberty to proceed in this hue and cry, and that the defendants should pay the costs in respect of the said reference.

CASE 125.

PAIN'S CASE. *B. R.*

Escape Warrant.
One committed in equity for a contempt, in rescuing another taken on Lord Chancellor's warrant; such person not liable to an escape warrant.

PAIN was committed to the *Fleet* by the late *Lord Chancellor Cowper* for a contempt in obstructing the execution of his Lordship's warrant for the commitment of *Pain*'s father, for the non-payment of a debt decreed to the plaintiff *Hinchcliffe*, and *Pain* having removed himself to the King's Bench, and being let at large by the Marshall, *Lord Chief Justice Pratt* granted his escape warrant against him, upon which *Pain* was taken in the *Strand*, and committed to *Newgate* as the county gaol.

And it being thought by *Pain*'s counsel, that an escape warrant would not lie in this case, it was moved that the warrant might be returned; which being granted,

The prisoner now moved to be discharged, insisting that an escape warrant did not lie, in regard the statute of the (*a*) first of Queen Anne, cap. 6. which gives the escape warrant, speaks only of persons committed by any of the Courts of Record at *Westminster*, upon any action of debt or damages, or *for a contempt in not performing orders or decrees made in Courts of Equity;* so that the statute does not extend to persons committed for contempts generally, but it must be for a "contempt "for not performing an order or decree." *Exceptio probat regulam*, and the statute mentioning this contempt, excludes all others; now *Pain*, though committed for a contempt, yet was not committed for a contempt in not performing any order or decree, there being no order or decree against *Pain*.

(*a*) Vide etiam 5 Annæ, cap. 9.

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Indeed if *Pain*'s father had been committed, and had escaped, there being an order against him for payment of money, an escape warrant would have lain against *him;* but *Pain* the son was not within the act, he not being to perform any order or decree, and, when committed, was only to suffer and not to perform any thing.

That this statute being a penal law, whereby the party was to be imprisoned without bail or mainprise, was to be taken strictly, and not to be enlarged by equity; and the intent of it was, to preserve the property of the subject, not to punish mere contempts.

Accordingly, and for these reasons, it was adjudged by all the Judges of the King's Bench, *seriatim*, that this warrant did not lie.

But there being an order of Chancery, that *Pain* the prisoner should be kept within the walls of the *Fleet*, and he now

escaping out of the gaol of the Court of King's Bench, the Court made a rule, that *Pain* should be delivered by the keepers of *Newgate* to the Marshall of the King's Bench, to be there kept in close confinement, according to the intention of the order in Chancery, whereby he was confined within the walls of the *Fleet*. PAIN's CASE.

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LAWSON *versus* LAWSON. (z)

CASE 126.

THE testator being languishing upon his death-bed, delivered to his wife a purse of gold containing about 100 guineas, and bid her *apply it to no other use but her own*, and likewise drew a bill upon a goldsmith to pay 100*l.* to his wife, *to buy her mourning* and to maintain her until her life-rent (meaning her jointure) should become due, and soon afterwards, (*viz.*) about seventeen days after the drawing of the bill) the testator died.

2 Eq. Ca. Ab. 575. pl. 4. Donatio causâ Mortis. Husband on his death-bed delivers to his wife a purse of 100 guineas, and bids her apply it to her own use. This is donatio causâ mortis, and a good legacy to the wife, and shall not go to the executors or administrators of the husband, if there is sufficient to pay debts. So likewise if the husband being ill (ut supra) draws a bill on his goldsmith to pay his wife 100*l.* for mourning, this is a good appointment. More doubtful, if the money on the bill were received in the husband's life-time.

1 Mylne & Cr. 231.

This coming on upon the Master's report, the *Master of the Rolls* was clearly of opinion, that as to the purse of gold, it was *donatio causâ mortis,* in regard the testator was then languishing upon his death-bed ; and therefore, it being in nature of a legacy, and not to take effect, but in case of the donor's death, under such circumstances, a man might give to his wife; and it was the stronger, it being said, that she was to apply it to no other use but her own; for consequently she was not to apply it to her husband's use.

His Honour further observed, that this being *donatio causâ mortis* need not be proved with the testator's will, neither need any such gift tho' in nature of a legacy be so proved ; for they operate as a declaration of trust upon the executor.

As to the other point, the Court at first held, that the testator's ordering the goldsmith to pay 100*l.* to his wife was but an authority, and determined by the testator's death. [442]

To which Mr. *Vernon* replied, that this was an authority coupled with an interest, and being given for mourning, it could not take effect but upon the testator's death, and therefore his death could not be a revocation; which seemed to

(z) See *Tate* v. *Hilbert*, 4 Bro. C.C. 292. 2 Ves. jun. 120.

LAWSON v. LAWSON.

have weight; but his Honour doubted, whether there could be a *donatio causâ mortis* without an actual delivery to such donee; at least, it was a point not settled, for which reason he would (he said) reserve it for further consideration.

Afterwards in *Hilary Vacation*, 1718, the *Master of the Rolls* delivered his opinion solemnly on both these points:

That the delivery of the purse was good; and must operate as a *donatio causâ mortis, ut res magis valeat, &c.* Because otherwise one could not give to his own wife, and there being a delivery by the testator in his last sickness, and when he was so near his end, and the bidding his wife apply it to no other use than her own, made this part of the case plain; and he cited Swinburne, 18. where it appears there are three sorts of gifts *causâ mortis*, and said this was in the nature of a legacy to the wife.

2*dly*, As to the bill of 100*l.* drawn upon his goldsmith payable to his wife to buy her mourning, and to maintain her until her life-rent (*viz.* jointure) should come in:

[443] This his Honour held good, and to operate as an appointment; that if the wife had received it during the husband's life-time, it would have been liable to some dispute, but that he apprehended this amounted to a direction to his executors, that the 100*l.* should be appropriated to his wife's use. And he inclined to think, that even if the wife had received it in the husband's life-time, she should have kept it; that being for mourning, it might operate like a direction given by the testator touching his funeral, which ought to be observed, though not in the will; that the Court ought to go as far as it could, to assist the meaning of the party in this case; here was a wife attending her husband in his last sickness, and the husband sensible of her affections, was conferring gifts upon her, and those not extravagant (for then he admitted equity ought not to make them good), but the gifts were but 200*l.* whereas the personal estate amounted to 8000*l.* so that this was only an instance of the tender care of an affectionate husband towards his wife; wherefore it was decreed accordingly. (1)

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(1) On the subject of donations *causâ mortis* vide *Drury* v. *Smith*, ante 404. and more particularly *Miller* v. *Miller*, post. Vol. III. 356. (*z*)

(*z*) In *Walter* v. *Hodge*, 2 Swan. 101. the cases on this subject are collected and arranged. And see *Duffield* v. *Elwes*, 1 S. & S. 243. *Hurst* v. *Beach*, 5 Mad. 351.

DRAKE *versus* ROBINSON.

CASE 127.

MR. *William Berners* of *Hadham* in *Hertfordshire*, having made a settlement of a real estate upon his wife for her jointure, and having contracted several debts, made his will, and thereby devised *all his real estate*, not comprised in the settlement, to trustees and their heirs for the payment of his debts, and was seised of several freehold and copyhold lands, * but had not surrendered his copyhold lands to the use of his will, and died leaving three sons, and part of the copyhold was of the nature of *Borough English*.

2 Eq. Ca. Ab. 232. pl. 10. One devises all his real estate to pay debts, and having part freehold and part copyhold, and dies without having surrendered the copyhold to the use of his will; regularly the copyhold shall not pass without being mentioned, and if mentioned, equity will on behalf of creditors supply the want of a surrender. But if the freehold estate be not sufficient to pay the debts, the copyhold, being real estate, shall be liable.

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Objected, The copyhold does not pass by this devise, for though, in the case of creditors, equity will supply the want of a surrender, yet the copyhold ought ever to be mentioned in the will, especially where (as in the present case) there is a freehold estate, that will satisfy the words of the will.

Lord Chancellor: If the copyhold passes, the youngest son, who is entitled to such part thereof as is *Borough English*, must contribute to pay his proportion of the debts. As betwixt the sons, it is a doubtful case; but with regard to the creditors, if there be not an estate sufficient for the payment of the debts without the copyhold lands, my opinion is, these ought to pass.

The man is not a just man, unless he takes care to pay his debts; for which reason he has made choice of words large enough for that purpose, a copyhold estate being a real estate.

And since the testator's first intention is to be honest, and pay his debts, to cramp such his design by a narrow construction seems like being accessary to the making such testator a knave even against his will.

But let the Master first see whether there be enough without the copyhold for the payment of the debts. (1)

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(1) Vide *Harris* v. *Ingledew*, post. Vol. III. 96.

CASE 128.

BALCH *versus* WASTALL.

LORD CHANCELLOR PARKER.

A. having outlawed *B.* brings a bill against *B.* and *C.* a trustee for *B.* with respect to an annuity, to subject this annuity to the plaintiff's debt. The Attorney General ought to be made party, and the plaintiff must get a lease or grant in the Court of Exchequer from the Crown. (*z*)

THE defendant owed money to the plaintiff by bond, and the plaintiff having outlawed the defendant before judgment, brought his bill in this court against the defendant, and one that was a trustee for the defendant as to an annuity of 20*l.* *per annum* devised to the defendant out of a personal estate in order to subject this annuity to the plaintiff's debt.

7. Sim. 490.

On its being objected, that this bill did not lie, all the defendant's estate being forfeited to the Crown, Mr. *Vernon* insisted, that since the plaintiff had gone as far as he could at law, and was hindered by the contempt of the defendant, and this being a matter of trust, and a creature of equity, the plaintiff ought rather to be relieved here, than sent to another court: *Frustra fit per plura, quod fieri potest per pauciora*; and he cited a case where Lord *Nottingham* had held, that one who had a judgment, and had lodged a *fieri facias* in the sheriff's hands, to which *nulla bona* was returned, might afterwards bring a bill against the defendant, or any other, to discover any of the goods or personal estate of the defendant, and by that means to affect the same; but he must first go as far as he can at law, by delivering this writ of *fieri facias*, and getting it returned. (*y*)

And to this the Court at first inclined; but afterwards were of another opinion; forasmuch as by the outlawry all the defendant's interest, as well equitable as legal, was forfeited to
[446] the Crown; and though the plaintiff was intitled to a grant thereof from the Crown, which, upon application to the Court of Exchequer, he would of course have, yet, since this trust continued in the Crown until taken out, they directed the plaintiff to get such grant, and make the Attorney General a party, and then to come again.

And agreeable hereto, afterwards in *Easter Term* 1721, in the case of *Hayward* v. *Fry*, where *J. S.* owed the plaintiff 100*l.* and the defendant *Fry* owed *J. S.* 100*l.* on note, and the plaintiff *Hayward* outlawed *J. S.* and brought a bill against *J. S.* and *Fry* to have this 100*l.* paid him, the Master

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(*z*) So —— v. *Bromley*, post. Vol. II. 269. *Attorney General* v. *Basnett*, Parker, 268. (*y*) *Smithier* v. *Lewis*, *Angell* v. *Draper*, 1 Vern. 399.

of the Rolls declared the plaintiff could have no title but by grant under the Exchequer seal, all the personal estate of *J.S.* being vested in the Crown by the outlawry, and put off the cause in order that the plaintiff might get such grant, and make the Attorney-General a party. (1)

BALCH *v.* WASTALL.

(1) So, *Rex* v. *Fowler*, Bunb. 38.

EARL OF CLARENDON AND MR. BLIGH AND HIS WIFE *versus* HORNBY.

CASE 129.

LORD CHANCELLOR PARKER.

On a partition in Chancery, every part of the estate need not be divided; but sufficient if each tenant in common, &c. have an equal share of the whole.

A Partition was decreed of the estate late Sir *Joseph Williamson*'s, two thirds whereof belonged to Lady *Theodosia Bligh*, and one third to the defendant *Hornby*; the estate consisted (among other things) of a great house called *Cobham-House*, and *Cobham-Park* in *Kent*, and of farms and lands about it of 1000*l. per annum.*

The defendant *Hornby* insisted to have a third of the house, and also a third of the park assigned to him by the commissioners who were to make the partition.

[447]

And this matter coming on before the *Lord Chancellor* upon a petition, it was urged on behalf of Mr. *Hornby*, that as he was intitled to a third of the whole, so consequently he was to have a third of the house and park; and in many cases in the law, things entire in their nature, as an house, a mill, or an advowson, might be divided; so a tenant in common shall have half the house, every other toll-dish, and every other turn of a church, &c. that thus it would be *at law*, in case of a writ *de partitione faciendâ*; and in this case *æquitas sequitur legem.*

1. Ch. Ca. 365. 16. Jac. 597.

Lord Chancellor: Care must be taken, that the defendant *Hornby* shall have a third part in value of this estate; but there is no colour of reason, that any part of the estate should be lessened in value, in order that the defendant *Hornby* should have one third of it; now if Mr. *Hornby* should have one third of the house, and of the park, this would very much lessen the value of both.

If there were three houses of different value to be divided among three, it would not be right to divide every house, for that would be to spoil every house; but some recompence

CLARENDON *v.* HORNBY.

is to be made, either by a sum of money, or rent for owelty of partition, to those that have the houses of less value.

It is true, if there were but one house, or mill, or advowson to be divided, then this intire thing must be divided (*z*) in manner as the other side contended; *secus* when there are other lands, which may make up the defendant's share.

[448] By the same reason, every farm-house upon the estate must be divided, which would depreciate the estate, and occasion perpetual contention; and it may be the intent of the defendant, when this partition is made, to compel the plaintiff to give the defendant forty years' purchase for his third of the house and park.

Therefore since the plaintiff *Bligh* and his wife have two thirds, I recommend it that the seat and park be allowed to them, and that a liberal allowance out of the rest of the estate be made to the defendant, in lieu of his share of the house and park.

(*z*) *Bodicoate* v. *Steers*, 1 Dick. 69. Ves. 143. *Warner* v. *Baynes*, Amb. 589. *Matthews* v. *Bishop of Bath & Wells*, 2 Dick. 652. *Turner* v. *Morgan*, 8

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8. Sim. 94.

CASE 130.

BUTLER & ANNE UX' *versus* DUNCOMB.

LORD CHANCELLOR PARKER.

2 Vern. 760. 10 Mod. 433. 1 Eq. Ca. Ab. 339. pl. 6. Term created for daughters' portions, commencing after the death of the father and mother, upon trust to raise the portions from and after the commencement of the term. Father dies, leaving a daughter. Decreed the portion is vested, but not raiseable during the life of the mother.

UPON the marriage of *George Duncomb* with *Mary*, one of the daughters of the late Lord C. J. *Pollexfen*, the defendant *George Duncomb* the father covenanted to settle lands in the articles mentioned (being 400*l.* a year) on *George Duncomb* the son for life, remainder to *Mary* his intended wife for life, remainder to the first and every other son of the marriage in tail male, remainder to trustees for five hundred years, upon the trust therein mentioned, remainder to the use of the defendant *George Duncomb* in fee.

The trust of the five hundred years' term was declared to be, that the trustees should, *from and after the commencement of the term*, raise portions for the younger children of the mar-

[449] riage, viz. if but one younger child, then 3000*l.* if more, 4000*l.* to be raised by the rents and profits, or by sale, demise, or mortgage, and *payable at twenty-one or marriage.*

The marriage took effect, and there was issue a daughter only (the plaintiff *Anne*) and *George* the husband died.

Afterwards, pursuant to the articles and a decree in this court, the defendant *George Duncomb* settles the same premisses (being 400*l.* *per annum*) on his daughter-in-law *Mary* for life, remainder to trustees for 500 years, the reversion to the defendant *George Duncomb* himself in fee.

The trust of the five hundred years' term is, (as before) that the trustees should, *from and after the commencement of the term*, by rents or profits, sale, demise, or mortgage, raise 3000*l.* to be paid to the plaintiff *Anne* at her age of twenty-one or marriage; but there is no provision for maintenance.

The plaintiff *John Butler*, who was but a mercer in *Guildford*, and of mean circumstances, by stealth and bribery prevails with the plaintiff *Anne* (when but fifteen, and without the consent of any of her relations) to marry him, and with her brings this bill for the portion.

It was urged for the plaintiff, that though the man had been in fault, yet this was now as the wife's suit for her portion, in which the husband joined but for conformity; and therefore his indirect practices in procuring the marriage were out of the case. *Quod cur' concessit.*

Next it was insisted, that the 500 years' term was vested in the trustees, presently, on sealing the deed; and was assignable and saleable; and that a provision for a portion was to be favoured; so that if it could be any ways consistent with the deed, it should be paid at such time as there was occasion for it, and not wait until the death of the parent the mother, who being now but forty-three years of age, the daughter might, at that rate, be sixty years of age, before her portion would be payable. [450]

That though the words were, that the trustees *from and after the commencement of the term* should raise the portion, yet (it was said) there was a legal, and an equitable commencement of the term; it was plain there was an estate of the term subsisting, by which the portion could be raised, and equity would call for it, when there was most occasion, which was upon the daughter's marriage; and when the payment by express words was appointed to be at the daughter's age of twenty-one or marriage, the other words inconsistent with these, should be rejected as repugnant; that whenever it should be raised, it must carry interest from the marriage, it being appointed to be then paid; and therefore to raise it now would be most beneficial to the daughter, and not prejudicial

BUTLER v. DUNCOMB.

to the reversioner, who in all events was to pay interest, either to the daughter, or to the mortgagee, and it could not be material to which.

That it must the rather have this construction, in regard, in this case, there was no maintenance provided for the daughter, until her portion became payable.

Besides, the person here contended with, was only the father, who had the reversion in fee, and had received the 4000*l.* which was the mother's portion: and yet now made a difficulty of parting with 3000*l.*

[451]

That though the settlement in this case was after the marriage, yet the plaintiffs grounded their pretensions upon the articles made before marriage; and notwithstanding it might be objected, that the plaintiff the daughter *Anne* was not a younger child within the trust of that term, yet as a daughter, though first born, when there was a son born after, was, in equity, deemed to be a (*a*) younger child, so here she should be considered in the same light, for that otherwise she could be intitled to nothing within those articles. *Quod curia concessit.*

(*a*) Ante, 245. Beale v. Beale.

As to authorities, Mr. *Vernon* cited the case of *Hellier* (1) and *Jones*, determined in the time of the (*b*) Lords Commissioners, and where it was decreed, that a reversionary term for years, expectant upon the death of the mother, should be sold for the payment of a portion at the marriage of the daughter; so likewise was it resolved in the case of (*c*) *Stainiforth* v. *Stainiforth.*

(*b*) Decreed by the Lords Commissioners the 14th Novem. 1 W. & M. and afterwards affirmed by their Lordships on a re-hearing; and again affirmed upon an appeal to the House of Lords.

(*c*) 2 Vern. 460.

And in a much stronger case than the principal one, that of (*d*) *Gerrard* v. *Gerrard*, where an estate was settled upon Sir *Charles Gerrard* for life, remainder to Lady *Gerrard* for life, remainder to trustees to raise 5000*l.* portion for a daughter by the marriage, if but one, to be paid within six months after the death of the *father and mother*, on the father Sir *Charles*'s dying leaving a daughter and no son, the daughter had a decree for raising the portion in the life of the mother the Lady *Gerrard*, who is yet living. And in the case of (*e*) *Corbet* and *Maidwell*, this case of *Gerrard* and *Gerrard* was allowed by Lord *Cowper*, though it was admitted, he said, if it had been *res integra*, he would not have gone so far.

(*d*) 2 Vern. 458. and cited post. 489. in Pierpoint v. Lord Cheyney.

(*e*) Salk. 159.

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Also Jones (Tho.) 201. *Greaves* and *Maddison*, was cited, where a journeyman mercer married the daughter, and the

(1) 1 Eq. Ca. Ab. 337. pl. 2.

portion was to be raised by a term for years, if the father died without issue male by the marriage, and should leave a daughter; and the mother on her death leaving a daughter, the Judges to whom the case was referred for their opinion, determined the portion to be due (1) in the life of the father.

Lord Chancellor: Though *Gerrard* and *Gerrard*, and *Greaves* and *Maddison* were strong cases, yet this case seems to go yet farther; and as Lord Chancellor *Cowper* (whom his Lordship was pleased to say he unequally succeeded) declared, those cases had come before him, he would not have gone so far, I for my part declare, I'll not go a jot farther; but where things are settled, and rendered certain, it will not be so material how, as long as they are so, and that all people know how to act. (2)

The words [from the commencement of the term] must be intended, *commencement in possession*; and in this case, if the trust of the term had been, that the trustees, after the commencement of the term, *and not before*, should raise the portion, there could then have been no doubt, but the term must have commenced before the portion could be raised. Now here those negative words are plainly implied; for when the deed says, after the commencement of the term, it plainly shews the intention of the parties to be, that it should not be before, and can have no other meaning.

And the penning of it in such manner might be owing to a reasonable and prudent care in the parents, to prevent this estate from being eaten up, and devoured with interest: for if the reversion might be mortgaged, it might have been, by [453]

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(1) This seems contrary to *Wingrave* v. *Palgrave*, ante 401.

(2) Although *Gerrard* v. *Gerrard*, *Greaves* v. *Maddison*, &c. have been constantly received as the law of the Court, yet Judges in later times have expressed their opinion of the inconvenience attending those determinations, and have anxiously sought for circumstances to distinguish the modern cases from them. *Sandys* v. *Sandys*, post. 707. *Reresby* v. *Newland*, post. Vol. II. 93. *Ravenhill* v. *Dansey*, ib. 179. *Brome* v. *Berkley*, ib. 484. *Hebblethwaite* v. *Cartwright*, Ca. temp. Talb. 31. *Stanley* v. *Stanley*, 1 Atk. 549. *Hall* v. *Carter*, 2 Atk. 354. *Stevens* v. *Dethick*, 3 Atk. 39. *Goodal* v. *Rivers*, Mos. 395. *Lyon* v. *Duke of Chandos*, 3 Atk. 416. *Churchman* v. *Harvey*, Amb. 335. *Smith* v. *Evans*, ib. 633. *Conway* v. *Conway*, 3 Bro. C. C. 267. (*z*)

(*z*) See Lord Eldon's observations on *Conway* v. *Conway*, in *Codrington* v. *Foley*, 6 Ves. 379. and see *Albemarle* v. *Rogers*, 2 Ves. jun. 477. 481. *Clinton* v. *Seymour*, 4 Ves. 440. *Lyddon* v. *Lyddon*, 14 Ves. 558.

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the same reason, mortgaged immediately on the marriage, and the mother being but a little above forty, may be supposed to live to double that number of years, (*viz.*) to eighty or upwards, within which time the 3000*l* mortgage-money would be more than trebled, and the mortgagee might foreclose, and by getting reports of the money due might make his interest principal (as it must be after the (*a*) report confirmed) by which means the whole reversion of 400*l*. *per annum* would be inevitably swallowed up.

(*a*) Vide post. 480. Bacon v. Clerk, and 653. Brown v. Barkham.

Therefore to prevent this hardship on the family, the words seem to have been inserted, and can have no other meaning, than that the portion should be raised after the commencement of the term in possession, whereby the parties have fixed a time for the raising it, which words, though so prudently inserted for the preservation of the estate from a probability of being lost, the other side would nevertheless have rejected.

Also his Lordship did not seem to take it, that the portion should carry interest from the marriage; though I did not observe that the Court gave any opinion as to that matter, but said, that if it were to yield interest, yet decreeing a mortgage to be made, would carry it further, by putting it in the power of the mortgagee, by a bill of foreclosure, to make even the interest principal upon every report; and that if this portion was due, the trustees (if they thought fit) might make the
[454] mortgage, without coming to the court, at least it seemed so hard a case upon the reversioner, that equity should not decree it.

As to the objection, that the settlement did not provide a maintenance until the portion was payable, there was no reason that equity should supply it, any more than that it should supply the want of a portion, if none had been provided; but this might be industriously omitted by the settlement, as intending to leave the child to depend upon the mother, who, by the law of the land, and of nature, was bound to provide for it.

Moreover the court observed, that here, in the trust declared by the marriage articles of the 500 years' term, it was not said (as usual) that if there should be issue male, and such issue should die before twenty-one without issue male, then the term should cease. So that if there had been issue male of the marriage, and that issue had survived twenty-one, and had at any time afterwards died without issue male, the daughter would have been intitled to her portion of three thousand pounds, and (as the other side contended) to the interest

from her marriage. [But *quære*, for this seems otherwise as to the interest, in regard, if there had been issue male that attained twenty-one, such issue male might by a recovery, have barred the subsequent term of 500 years, and during the life of such issue male, the principal of the portion would be intirely precarious, and therefore not due, and for the same reason could not carry interest.]

That it was no objection to the grandfather, that he had received 4000*l.* portion upon the son's marriage with the plaintiff's mother, and therefore ought not to scruple parting with 3000*l.* to the plaintiff his grand-daughter; since, for that 4000*l.* the grandfather settled a jointure of 400*l.* a year upon [455] the son's wife, which might be so long enjoyed by her, as to make it a dear bargain, upon the common methods of purchase.

However the case being of consequence, *Lord Chancellor* adjourned it, and directed in the mean time precedents should be laid before him.

Afterwards upon the (*a*) last day of causes in *Easter Term* (*a*) 8 May 1719. 1719, *Lord Chancellor*, having taken time to consider of the case did solemnly deliver his opinion.

He said, the question being, when this portion of 3000*l.* should be raised? he should answer, *prout* the deed, that it should be raised after the commencement of the term in possession.

That the declaring by the trust of the term, the portion should be raised after the commencement of the term, implied a negative, that it should not be raised before; and if those negative words had been inserted, there could have been no question at all.

That a declaration of a trust was like the prescribing a law to a trustee, which was to be observed by him, and contained in it a prohibition to act to the contrary; it was such an affirmative, as implied a negative, in the same manner, as the declaring in the trust of the term, that 3000*l.* be raised, implied, that no more than 3000*l.* should be raised; or as that part of the declaration of trust, which said the 3000*l.* should be paid to the daughter at her age of twenty-one, implied it should not be paid before twenty-one.

That it had been objected, a term (especially for the raising [456] of portions) might in some cases begin earlier in equity, than it would at law; as in the case of *Savile* and *Savile* (which was argued this term) where, upon the marriage of the Lord *Eland* (son to the Marquis of *Halifax*) with the daughter

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of the Earl of *Nottingham*, a rent-charge of 2000*l.* *per annum* was settled upon her for her jointure, and a term of ninety-nine years was limited to commence after the death of the Lord *Eland* the husband, determinable on the death of his then intended wife, in trust, the better to secure to her this rent-charge, with remainder of the land thus charged, to the first, &c. son of the marriage, with remainder to trustees for 500 years, to raise portions for daughters, if no issue male; the portions to be paid at the age of sixteen, or marriage, which should first happen; and afterwards the Marquis of *Halifax* settled the reversion, by way of voluntary settlement on Sir *George Savile*, subject to the limitations and charges in his son's settlement, and to take effect on failure of issue male of his own body.

In which case *his Lordship* allowed, that this 500 years' term for portions took place in equity from the death of the Lord *Eland*, the ninety-nine years' term being raised for a particular purpose only, *scil.*) for securing the rent-charge, and subject to that trust, which extended only to *part* of the profits:

Whereas, in the principal case, the whole profits of the premisses were disposed of until the commencement of the term, (*viz.*) to the mother for her life, which distinguished it from the case of *Savile* and *Savile*.

[457] Again, it had been objected, the portion was to be paid at the age of twenty-one or marriage, and since it was expressly directed, any clause to the contrary might be rejected as well as this.

But surely it is a rule both in law and equity, so to construe the whole deed or will, as that every clause should have its effect.

He agreed the intention was to provide for a daughter; but still not so as to raise the portion until the term should commence; and yet the words which ordered the payment of the portion to the daughter at her age of twenty-one or marriage, should have their effect; *viz.* they should vest a right in the daughter to this portion, when she had attained twenty-one, (as she then had) and having attained that age, her portion, in case of her death, should go to her executors or administrators as a vested interest.

That in the order and nature of this deed, the portion was first to be raised, and then to be paid; but still the same was not to be raised until after the commencement of the term; and to take it in any other sense was rather expunging than construing.

That there was no precedent against this; *Corbet* and *Maidwell* was a different case; and yet there Lord *Cowper* declared, that he thought precedents had gone further than he should have carried them.

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That the common methods of settlements, (*a*) now a days, directed, that no sale or mortgage should be made for raising of portions, until the premisses should come in possession; which though not conclusive in this case, yet were they as so many protestations against the unreasonableness, and inconvenience of such sales of reversions; that it would plainly ruin this estate, and the reversionary interest therein, if the daughter and her husband had a power to raise the portion in this manner; for it must carry interest, and that interest may afterwards be made principal, which, with the charge of the suit, would be so heavy, that (in all probability) the estate charged would be foreclosed before it could come into possession, and it would, upon every removal of the security, be still harder for the reversioner to procure money.

(*a*) Vide post. Vol. II. 99. in the case of Reresby v. Newland.

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So that the portion in this case, though vested, was not to carry interest until the term should commence, for all interest is in default of payment.

However, his Lordship said he would not dismiss the bill, for the parties might still apply for a sale under this decree, whenever the term could come into possession. †

† But it appears from the Register Book, that afterwards, on the wife and trustees consenting in Court, Mr. *Butler* the husband was allowed to raise 1500*l.* (a moiety of the portion) by mortgaging the reversionary term to supply his occasions in trade.

3. Tu. 4 Ch. 103.

11. Cun. 391.

BOSVIL *versus* BRANDER.

CASE 131.

A Feme sole is a mortgagee in fee for 800*l.* and marries a tradesman, who becoming a bankrupt, a commission of bankruptcy is taken out against him, and the commissioners assign over all his estate real and personal. Afterwards the husband dies, and the writings relating to this mortgage being in the assignees' hands, the widow of the bankrupt brings a bill in equity against the assignees for these writings, and to have the benefit of the mortgage. (1)

At the Rolls. A feme sole mortgagee in fee marries, and the husband becomes bankrupt and dies, the assignees of the bankrupt, and not the wife, intitled to the mortgage; (*z*) *secus* if by articles before marriage it was agreed that this should continue to the wife.

(1) In *Jewson* v. *Moulson*, 2 Atk. 420. Lord *Hardwicke* expresses great

(*z*) See *Doe* v. *Parratt*, 5 T. R. 652.

BOSVIL v. BRANDER.

This cause came on to be heard, and for its difficulty was ordered to be spoke to again, when his Honour delivered his opinion solemnly for the plaintiff the wife.

But afterwards being dissatisfied with that opinion, he ordered the decree to be stayed, and to be attended again by counsel.

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doubt, whether a court of equity would interfere, where the husband, or his *general* assignees, could get possession of the wife's property, without the aid of equity; as to which, vide *Winch* v. *Page*, Bunb. 86. *Anon.* Pre. Cha. 548. *Harrison* v. *Buckle*, 1 Stra. 238. *Gardner* v. *Walker*, ib. 503. *Jewson* v. *Moulson*, 2 Atk. 420. but where the property is a subject of *equitable* cognizance, it is clear that the *general* assignees of the husband, (whether by operation of law or otherwise) are subject to the same equity with the husband himself, and it does not seem material whether the wife or the husband, or his representatives, or general assignees come for the aid of the court. *Jacobson* v. *Williams*, ante 382. *Ex parte Coysegame*, 1 Atk. 192. *Grey* v. *Kentish*, ib. 280. where the wife was the petitioner. There is a mistake in the report of that case, for the husband of *Elizabeth Kentish* is there supposed to be the bankrupt, whereas it appears by the Register's book, that the bankrupt was one *Crispe* who married one of the two children of *Elizabeth Kentish*, and who made the assignment to *Barratt*, (as mentioned in the report) in the mother's life-time, and *Crispe* having died before the mother, his wife upon her mother's death petitioned to have her share of the *South Sea* annuities transferred to her, which was ordered accordingly, notwithstanding the opposition of the general assignees of *Crispe*. Reg. Lib. A. 1748. fo. 532. So, in *Watson* v. *Mascal*, 19 *March* 1732, the case was this. In *June* 1730, a commission of bankruptcy issued against *John Mascal*. In *Sep.* 1731, *Samuel Wise* died intestate, and thereupon one fourth part of his personal estate came to *Sarah* the wife of the bankrupt, as one of the next of kin. On 2 *Jan.* 1732, the commissioners assigned this share of the intestate's personal estate to the assignees under the commission. The intestate had proved a debt of 1581*l.* 7*s.* under the commission, and had in his life-time received a dividend of 5*s.* in the pound, which had reduced the debt to about 1186*l.* The bankrupt had made no settlement previous to his marriage, but *afterwards* settled some copperas works in *Kent* upon his wife and the children of the marriage. The bill was filed by the assignees against *Mascal* and his wife, and the other next of kin, and the administrator of the intestate, to have accounts of the personal estate, and to have the share of *Sarah Mascal* paid to them as assignees under the husband's commission. *Sarah Mascal* put in her answer separately, and insisted, that her share of the intestate's personal estate, "ought not to be applied, until "*after her decease*, towards satisfac- "tion of her husband's creditors, but "ought to be laid out in the names of "trustees, as a provision for herself, "and her children, *if she should have* "*any*." The other next of kin by their answer insisted, that the 1186*l.* which remained due from the estate of the bankrupt to the estate of the intestate, ought to be set off and deducted out of the fourth part, to which the bankrupt *John Mascal* became intitled in right of his wife. The decree (after directing an account of the personal estate) directed, that the administrator should place out the fourth part of the residue belonging to *Sarah Mascal* on government securities in the names of trustees to be allowed by the master, and that the interest thereof should be paid to *Sarah Mascal* for her life for her separate use, and *after her decease* the said fourth part was to be paid to

Whereupon his Honour gave his opinion, that if there had been any articles before the marriage, purporting that this mortgage money should continue in the wife as her provision, or should be assigned in trust for her, they would have been a specific lien upon the mortgage, and have preserved it from the bankruptcy.

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the plaintiffs the assignees to be divided amongst the creditors under the said commission. And it was declared, that the said copperas works were to go and be applied amongst the creditors under the said commission. And as for the debt arising by the bankrupt to the intestate, "the whole estate of the said "intestate was to be considered as a "creditor on the said bankrupt's estate. Reg. Lib. B. 1731. fol. 211.—*Jewson* v. *Moulson*, 2 Atk. 420. *Saddington* v. *Kinsman*, 1 Bro. C. C. 44. So, *Worrall* v. *Marlar*, and *Bushnan* v. *Pell*, 1 Cox, 153. Reg. Lib. B. 1784. fol. 112. 342.—*Wenman* v. *Mason*, before Lord *Northington* Trin. Vac. 1765, where *William Wenman* devised his real estates to trustees, upon trust to pay the rents and profits to his wife for her life, and after her death to sell certain parts thereof, and to apply the produce equally amongst the children of his brother *George Wenman*, who should be living at the death of his wife; and upon trust to convey other parts thereof, after the wife's death, to the Duke of *Portland* in fee, but charged with the payment of 1200*l.* to be divided and paid amongst such of his said brother's children as aforesaid. There were three children of *George Wenman, viz.* the plaintiff *William Wenman, Ellen* the wife of the plaintiff *William Warner*, and *Ann* the wife of *Thomas Cotton*; and by articles of agreement of 31 *Dec.* 1753, (which was in the life-time of the testator's widow) made between the said *W. Wenman*, *W. Warner* and *Ellen* his wife, and *Thomas Cotton* and *Ann* his wife, it was agreed between them, that if either of the said *William Wenman*, *Ellen Warner*, or *Ann Cotton*, should die in the life-time of the testator's widow, yet that their shares of the abovementioned funds should not survive to the others, but should be taken, as if such child so dying were actually possessed thereof. And the parties executed mutual bonds for the performance of this agreement. Afterwards, but in the life-time of the testator's widow, *Thomas Cotton* applied to one *Humfrey*, to become bound, as surety for him, in a bond for 400*l.* to one *Bache*; and as an indemnity to *Humfrey*, *Cotton* executed a written agreement, dated the 29 *July* 1754, whereby he agreed upon demand to assign to *Humfrey*, all the legacies and sums of money to which he was intitled in right of his wife under the will of the said testator, and the benefit of the said articles of agreement of 31 *Dec.* 1753, and the bond executed by *Wenman* and *Warner* to him for the performance of that agreement; and *Cotton* at the same time deposited with *Humfrey* his part of the said articles of agreement, and the said bond. *Cotton* afterwards became indebted to the plaintiff *W. Wenman* in 300*l.* By indenture of 24 *April*, 1755, reciting the agreement of 29 *July* 1754, *Cotton and his wife* joined in assigning to *Humfrey*, "all legacies and "sums of money, bequeathed to *Ann* "*Cotton* by the will of the said *W.* "*Wenman*, and all the right, title and "interest of them the said *Tho. Cotton* "and *Ann* his wife, in or to the same," to *Humfrey* upon trust, that he should at any time during the life of the said testator's widow, sell, mortgage, or otherwise dispose of the same; and out of the money to arise therefrom, in the first place, to pay the money due on the said bond to *Bache*, and then to pay the sum of 300*l.* and interest, due to the plaintiff *Wenman*; and to pay the residue to *Cotton*, his executors, administrators and assigns. *Humfrey* was called upon to pay *Bache*'s bond, and

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Also it might have been a matter of different consideration, if the assignees had been plaintiffs in equity, and desired the aid thereof to strip an unfortunate widow of all that she had in the world, towards the doing of which, equity would hardly have lent any assistance; because the assignees claiming under the bankrupt husband, could be in no (*a*) better plight than the husband would have been; and if the husband had

(*a*) Ante, 383. Jacobson v. Williams.

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actually paid it. *Cotton* afterwards became bankrupt. The bill was filed by *Humfrey* and *Wenman*, against the trustees, and the Duke of *Portland*, and the assignees under *Cotton*'s commission, and *Cotton* and his wife, and other parties, to have the trusts of the will executed, and the 1200*l.* raised on the Duke of *Portland*'s estate, and the share of Mrs. *Cotton* applied first in payment of the plaintiff's debts, and the residue paid to such of the defendants, as should appear to be intitled thereto. Mr. and Mrs. *Cotton* put in a joint answer, and no claim was thereby made on the part of Mrs. *Cotton*, of any interest in these funds. Another defendant, *Hannah Terrick*, the executrix of her father *Richard Terrick*, by her answer insisted, that *Cotton* being indebted to her father in several sums of money, *Cotton* and his wife joined in making a similar assignment of these funds to *Richard Terrick* for securing such debts; and that the several sums of 45*l.* 9*s.* 3*d.* and 180*l.* with interest, still remained due on that security; the assignment to *Terrick* was dated the 25th of *Jan.* 1755, and the defendant therefore insisted, that she was at least intitled to be paid in preference to the plaintiff *W. Wenman*, who was not included in the agreement of the 29th of *July* 1754. *Humfrey* afterwards became bankrupt, and his assignees became plaintiffs by supplemental bill. By the first decree it was declared, as to the third part of Mrs. *Cotton*, that the assignees of *Humfrey* were intitled, "subject to the directions thereafter "reserved with respect to Mrs. *Cotton*." to the principal and interest secured by *Cotton*, out of the said third part to *Humfrey*; and in the next place, that the defendant *Hannah Terrick*, was intitled out of the said fund to the sums of 45*l.* 9*s.* 3*d.* and 180*l.* with interest; and in the next place, that the plaintiff *W. Wenman*, was intitled out of the said fund to the sum of 314*l.* 6*s.* 6*d.* with interest, and that the surplus (if any) would belong to the assignees under *Cotton*'s commission. And his Lordship ordered the cause to stand over to the next term, "for the "examination of Mrs. *Cotton*, touching "her interest, which her husband be-"came intitled to in her right," and reserved the consideration of further directions touching her interest, until after her appearance, or the further order of the Court. Reg. Lib. B. 1764. fol. 454. The cause came on again in Mich. Term, when "Mrs. *Cotton* being "present in Court, and examined as to "her interest, and submitting to the "Court, in case she has some proper "allowance made for herself and her "children, that the money coming to "her and her husband in her right, shall "go to the creditors of her said hus-"band; and also submitting to the Court "the *quantum* of such allowance: His "Lordship directed the cause to stand "over to the next term, and in the mean "time the parties were to be at liberty "to lay proposals before the Master for "such allowance to the defendant Mrs. "*Cotton* on behalf of herself and her "children, for the approbation of the "Court." Reg. Lib. B. 1765. fol. 60. The cause came on again in Hilary Term, when "it appearing, that it had been "proposed, that 300*l.* should be ap-"plied for the benefit of Mrs. *Cotton* "and her children, in satisfaction of "her interest in the premisses, and she "being willing to accept thereof, His "Lordship declared, that the same was "a reasonable proposal, and ordered

in equity sued for the money, or else prayed that the mortgagor might be foreclosed, equity (probably) would not have (*a*) compelled the mortgagor to pay the money to the husband, without his making some provision for his wife; or at least the wife, by an application to the court against the husband and the mortgagor, might have prevented the payment of the money to the husband, unless some provision were made for her.

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(*a*) Jacobson v. Williams, ubi supra.

But in the present case, the *widow* was plaintiff against the assignees, so that *she*, and *not the creditors* sought the aid of equity. [460]

And here being in the mortgage deed a covenant to pay the mortgage money to the wife, this debt, or chose in action was well assigned by the commissioners to the assignees, and vested in them; like the case of (*a*) *Miles* v. *Williams*, where a bond made to a wife, *dum sola*, was adjudged to be liable to the husband's bankruptcy, and assignable by the commissioners.

(*a*) Ante, 249.

"that 20*l.* should be paid to *Cotton* "and his wife for their immediate use; "and the remaining 280*l.* should be "laid out, and the interest paid to Mrs. "*Cotton* for her separate use for her "life, or until further order; and on her "death that her children, who should "be then living, or the issue of any "child or children who might be then "dead, or in default of issue, then such "other person or persons as should be "intitled thereto, should be at liberty "to apply to the Court for directions "touching the transfer of the same." Reg. Lib. B. 1765. fol. 168. — Most of the cases above mentioned have arisen between the wife and the *general* assignees of the husband. But there seems to have been more doubt, where the husband has assigned some *particular* chose in action, or trust term of the wife, for a full valuable consideration, whether the Court will impose any terms in favour of the wife upon such particular assignee. Vide Sir *Edward Turner's* case, 1 Vern. 7. *Pit* v. *Hunt*, ib. 18. *Tudor* v. *Samyne*, 2 Vern. 270. *Packer* v. *Wyndham*, Pre. Cha. 412. *Walter* v. *Saunders*, 1 Eq. Ca. Ab. 58. pl. 5. *Bates* v. *Dandy*, 2 Atk. 207. (*z*) *Quære*, Whether in these cases of *particular* assignments, any distinction has been made between a trust term, and a chose in action of the wife.

(*z*) The opinion expressed by Lord *Thurlow* in *Worrall* v. *Marlar*, that a particular assignee of the husband for valuable consideration takes the wife's chose in action free from her equity to have a settlement out of it, has been frequently disapproved. See *Roberts* v. *Roberts*, 2 Cox, 422. *Like* v. *Beresford*, 3 Ves. 511. *Hill* v. *Atkinson*, 4 Ves. 530. note. *Mitford* v. *Mitford*, 9 Ves. 100. *Wright* v. *Morley*, 11 Ves. 20. *Beresford* v. *Hobson*, 1 Mad. 373. *Elliott* v. *Cordell*, 5 Mad. 156. And it is now settled that tho' the husband's assignment may bar the wife's right by survivorship, it does not bar her right to a settlement, *Johnson* v. *Johnson*, 1 J. & W. 472. And see Co. Lit. 351. a. note (1). 1 Fonb. Eq. 313. *Steinmetz* v. *Halthin*, 1 Gl. & J. 64. *Stamper* v. *Barker*, 5 Mad. 157.

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Wherefore, if the right to the debt was vested in the assignees, (as plainly it was) though the legal estate of the inheritance of the lands in mortgage continued in the wife, yet this was not material, it being no more than a trust for the assignees; like the common case, where there is a mortgage in fee, and the mortgagee dies, here the mortgage money belonging to the executor, though the heir takes the legal estate by descent, yet he is but a trustee for the executor; for the trust of the mortgage must follow the property of the debt, else the mortgagor would be in a very hard case, liable to be sued by the assignees of the commissioners upon the covenant, and also in an ejectment by the wife of the mortgagee; whereas the latter suit would be injoined in equity.

One agreeing to leave his wife 1000*l.* within three months after his death, cannot be inforced in equity to amend the security.

Then it was insisted, that here were articles entered into before the marriage of the bankrupt and his wife, by which the husband covenanted to settle the wife in the manor of *Dale*, or to leave her 1000*l.* within three months after his death.

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* But in this agreement it appeared that the husband had his election all his life-time, and that if the wife had brought her bill in equity against the husband, she could not have compelled him to do the one or the other, neither could she upon such bill or otherwise have compelled him to give any farther or better security for the payment of this 1000*l.* because she had that security, which she at first agreed to to take, (*b*) and the court could not better it against her own agreement.

(*b*) See Collins v. Plummer, ante, 104.

But upon another point, *viz.* as to 200*l.* part of the wife's portion, on a note given by the husband at his marriage, signifying his consent that the wife should have this 200*l.* the Court held the same was specifically bound thereby, so that with respect to this only, the plaintiff was relieved, and the bill, as to the rest, dismissed. (1)

(1) Reg. Lib. A. 1717. fol. 538.

EARL OF THOMOND *versus* EARL OF SUFFOLK *et al.*' (1)

Case 132.

1892 3 Ch. 520

Lord Chancellor Parker.

2 Eq. Ca. Ab. 134. pl. 2, 3. 567. pl. 1.

One devises to her grandchild a debt of 4000*l.* owing to the testatrix by *J. S.* provided if any part of the debt should be paid in before the testatrix's death, then so much as should be paid in, to be made good to the grandchild out of the surplus of her estate. Afterwards the testatrix released 2000*l.* of the said debt to *J. S.* without having received any of the money. Decreed that this was no ademption of the legacy pro tanto, but that the legatee or her representative was intitled to the whole 4000*l.* as much as if the same had been paid in to the testatrix.

THE Countess Dowager of *Thomond* had two several sums of 2000*l.* and 2000*l.* due to her on two several bonds, the one for 2000*l.* from her grandson the plaintiff the present Earl of *Thomond*, the other from her grand-daughter in law, the Lady *Henrietta Obrian*, (afterwards Countess of *Suffolk*, and since deceased) for 2000*l.* also.

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The Countess Dowager of *Thomond* by will gives these two sums of 2000*l.* and 2000*l.* and all interest due for the same, to her grand-daughter the Lady *Mary Obrian*, and devises away the surplus of her estate, with a proviso, "that in case all, or "any part of these two sums should be paid in before the "testatrix's death, then the said testatrix gives to the said Lady "*Mary Obrian* 4000*l.* or so much money as the principal "money so paid in should amount unto, as the case should "fall out.

Afterwards the testatrix, in her life-time, released to her grandson the Lord *Thomond* the 2000*l.* which was due to her upon his bond, without having received any part of the money, and died; and her legatee the Lady *Mary Obrian* died intestate; upon which the plaintiff the Earl of *Thomond* her brother administered to her, and as her administrator demanded the 2000*l.* which was released to himself upon his bond, and also the 2000*l.* due upon the other bond given by the Lady *Henrietta Obrian.*

The first he demanded out of the assets of the testatrix the Countess Dowager of *Thomond*; and the latter he claimed against the defendant the Earl of *Suffolk*, who, though he was not executor or administrator of his said late Countess, nor had any legal assets, yet (as was insisted by the plaintiff) remained still chargeable therewith in equity, in respect of a great jointure which he had long enjoyed by his Lady, and

(1) Reg. Lib. A. 1717. fol. 468.

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divers rich jewels, which she brought him upon their intermarriage.

In regard to the first, it was objected for the defendants, that the testatrix, after having bequeathed these two sums of

[463] 2000*l.* and 2000*l.* due upon the two bonds, to her grand-daughter the Lady *Mary Obrian*, releasing one of them, was a revocation, or ademption of the legacy *pro tanto*.

That the diversity which had been usually taken, was, if the debtor spontaneously and uncalled upon by the testator, paid in a debt to him, which he (the testator) had before given away by his will, this was not a revocation of the will; for in such case the testator was only passive, and did not act himself; whereas it must be *his* act, which revokes the will, and the testator could not help receiving in the money, if the debtor would pay it.

But if the testator himself called for the debt, and received it, there it must be a revocation; it being the testator's own act to call in the debt.

Now in the principal case, it was the testatrix's own voluntary act to release and extinguish that bond, which she had before devised to Lady *Mary Obrian*, and consequently was a revocation of the will for so much.

And if this was a revocation, the subsequent words could not make it a new bequest of two thousand pounds out of the surplus of the testatrix's estate; it being given upon a condition precedent, *viz.* "If this 4000*l.* or any part thereof, should "be paid in, then the testatrix gives 4000*l.* or so much as "should be paid in, out of the surplus of her estate, to her "said grand-daughter;" but no part of the 4000*l.* being paid in, (this 2000*l.* being released by the testatrix without being *paid in*) here was no bequest out of the *residuum*.

[464] Also the meaning of the testatrix was said to be, that if any part of the 4000*l.* should be paid in, by which the bulk of the surplus should be so much increased, then, and not otherwise, the testatrix gave a new legacy out of such surplus, *viz.* to the amount of the money so paid in. Besides a release of a debt was not a payment, for it was most plain, even by the present case, that there might be a release without payment.

That it appeared the words were against the claim of this new legacy, and as the words were against it, so also was the intent of the testatrix, who did not purpose to give a new legacy out of the surplus to lessen the same, unless such sur-

plus were increased by the paying in of this 4000*l.* or some part of it.

Lord Chancellor: The testatrix intends by this will (amongst other things) to make a provision of 4000*l.* for her grand-daughter Lady *Mary*; and though she has shewn her kindness to her grandson (one of these bonds being given to him for 2000*l.*) yet this no ways imports an alteration or diminution of her kindness to her grand-daughter. I cannot approve of the diversity, that if the testator gives away a debt by his will, and afterwards calls it in, this must be a revocation; *secus* if it be paid in to the testator unasked for; for suppose the testator called in that debt, fearing it might (*a*) be lost, and not liking the security; is there any reason that this should deprive the legatee of his legacy? And the case of *Orme* and *Smith* (*b*) proves that the testator's receiving in the debt is no revocation or ademption of the legacy. (1)

(*a*) See Vol. II. 469. the case of Ford v. Fleming accord'.

(*b*) 2 Vern. 681.

As to the matter of the release, that surely implies payment and satisfaction of a debt, being tantamount to the testator's receiving it, and giving it back again; and in the present case, it is the same, as if the will had said, *if these debts be paid or discharged.*

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There has been an objection made, that the plaintiff the Lord *Thomond*, being administrator to his sister Lady *Mary*, craves a double advantage of this debt; for first (say they) it is given him by the release, and then he takes it over again by the will, as representing his sister.

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(1) As to this distinction between a voluntary and compulsory payment, vide *Crockat* v. *Crockat*, post. Vol. II. 165. *Rider* v. *Wager*, ib. 328. *Ford* v. *Fleming*, ib. 469. *Ashton* v. *Ashton*, post. Vol. III. 386. (*z*)

(*z*) From *Barker* v. *Rayner*, 5 Mad. 208. it appears that this distinction, notwithstanding the countenance given it in *Coleman* v. *Coleman*, 2 Ves. jun. 639. and *Roberts* v. *Pocock*, 4 Ves. 150. is incorrect, and that the true question in each case is whether the legacy be specific, or demonstrative, i. e. a general legacy, but with a particular security. If the legacy be specific, and the subject given do not exist in *specie* at the testator's death, it is adeemed: if demonstrative merely, it will still be due, tho' the fund pointed out for its payment should have been disposed of in the testator's lifetime. *Stanley* v. *Potter*, 2 Cox, 180. *Chaworth* v. *Beech*, 4 Ves. 555. *Innes* v. *Johnson*, ib. 568. *Fryer* v. *Morris*, 9 Ves. 360. *Barker* v. *Rayner*, ub. sup. were cases of specific; *Coleman* v. *Coleman*, *Roberts* v. *Pocock*, ub. sup. *Kirby* v. *Potter*, 4 Ves. 748. *Raymond* v. *Brodbelt*, 5 Ves. 199. *Le Grice* v. *Finch*, 3 Mer. 50. of demonstrative legacies. And see *Smith* v. *Fitzgerald*, 3 V. & B. 2. *Graves* v. *Hughes*, 4 Mad. 381. As to specific legacies see *Hinton* v. *Pinke*, post. 539.

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But it is to be observed, that this claim as representing his sister, is in (*a*) *auter droit*, and as if the sister was alive and made her claim; it must be liable to her debts if she owed any, and is the same thing, as if any other person had been her executor or administrator.

(*a*) Vid. 1 Vern. 284. Jason v. Jarvis, and post. Copping v. Copping. Vol. II. 295.

With regard to the other point, *viz.* the plaintiff's demand due by bond from the defendant's wife *dum sola*, against the defendant her husband, in respect that he had received much by the consequences of the marriage:

It was urged, that though the same were not legal assets, yet there was great reason, the defendant should be liable, in equity, on account of the benefit so received.

That if an husband should have a vast portion with a wife in goods, ready money, or jewels, or become intitled to a term for years in her right, and the wife should die, owing a debt contracted *dum sola*, there was great equity, (though they might not be legal assets,) that the husband should be charged by reason thereof, and not go away with his wife's fortune, at the same time that he was not liable to pay her debts. †

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Feme sole owes debts by bond, and takes husband and dies, leaving no assets, but at the marriage had a term for years, a jointure, a shop of goods, or other personal estate, in consideration of which the husband makes no settlement; husband not liable.

That here the question in equity was, whether the husband had not with his wife so much as would pay this debt? If he had, he ought to pay it; and it might be a common, and would be a hard case, if there were a feme sole trader, who had a shop full of valuable goods, and she should marry, and die indebted, there the husband should by the marriage be intitled to all these goods, which not being legal assets, would not be liable; surely under such circumstances, nothing could be more reasonable, than that he should be charged with his wife's debts.

It was admitted to be different, where the husband makes a settlement in consideration of a portion; for in that case, he being a purchaser, the portion shall not be assets to pay the debts of the wife; *secus* if the husband makes no settlement.

That in the principal case, the jewels which the defendant the Earl of *Suffolk* had with his wife, together with a rent-charge of 1500*l.* a year, that he was intitled to in her right, ought to be liable to the wife's debt *dum sola*, and equity should favour any construction for the payment of debts. See the case of *Freeman* v. *Goodhan*, Chancery Cases, 295, where Lord Chancellor *Nottingham*, with some earnestness, said, *he would change the common law in that point.*

† In the Office of Executor, chap. 17. sect. 1. this is mentioned as an hard case, and proper for equity.

On the other side it was insisted, that the defendant the Earl of *Suffolk* was neither executor nor administrator of his late Countess; nor was it pretended, that he had possessed himself of any thing that was her legal assets; so that at law he was no ways liable to this bond.

And in equity, all circumstances, when considered, were rather in his favour, as that he had before, or soon after the marriage, paid such of his lady's debts as were disclosed to him, and advanced considerable sums for her.

That the two thousand pound bond in question was not discovered to him at the time of the marriage, nor until long after; which if it had appeared, he might have lived in that provident manner, as to have paid this her debt out of her own estate.

That it was in the election of the Countess dowager of *Thomond*, with regard to this two thousand pound bond, to have made the defendant the Earl of *Suffolk* liable by putting the bond in suit, and recovering judgment upon it, during the coverture; that she had a long time to make her election, the marriage having continued ten years or upwards; and her chusing not to put this bond in suit, was tantamount to a declaration that she would abide by her original security, and not involve the defendant the Earl therein; and, on the other hand, there could be no question, but it was in the power of the Countess dowager of *Thomond* to choose that security for her debt, it being the same which was originally given her.

That a court of equity would possibly relieve, in case the wife, who was the debtor, had died in so short a time, as that judgment could not have been obtained against the husband; but there was not the like reason that equity should relieve, when the testatrix had time sufficient to have made the husband liable, and yet, voluntarily, nay, perhaps *industriously*, had omitted it. [468]

That, by the known rules of law, the husband was only liable during the coverture, and here not being circumstances to vary the law, equity ought not to interpose.

Indeed, if there had been a great personal estate of the wife, or if part of that estate had still remained in specie, (as in the case of a term for years) there might have been some ground for an application of this nature; but in the present case it was proved, that the defendant the Earl of *Suffolk*, since his marriage, had advanced his manner of living, and that the increase of his charge had amounted to the full value of his countess's jointure.

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Lord Chancellor: If the defendant the Lord *Suffolk* the husband had been executor or administrator of his wife, or executor of his own wrong, he had been liable at law as far as assets; but in none of these capacities doth he appear before the Court. Any person, that has any of the Countess of *Suffolk*'s assets, is liable: the creditor of the Countess of *Thomond*, had a fair opportunity of recovering judgment against the Earl and Countess of *Suffolk*, and thereby of making the Earl of *Suffolk* liable; but this she has not done, and (for ought appears) has purposely omitted.

[469] The husband during the coverture is answerable for the wife's debts; and as perhaps this may be hard when he has nothing with her, so you are to set against such hardship, that if the husband has received a personal estate with his wife, and happens not to be sued during the coverture, he is not liable.

But it is to be considered, that the husband during the coverture is to answer for the whole debts of the wife though he had nothing with her; whereas an executor or administrator is responsible only so far as he has assets.

As to the case that has been put, where a husband marries a feme sole trader and the wife dies indebted, that though the husband in such case be not at law liable to the debts, yet he ought to be so in equity:

That is with me a question: for the husband runs a hazard in being liable to the debts much beyond personal estate of the wife, and in recompense for such hazard he is intitled to the whole of the personal estate though exceeding the debts, and discharged therefrom, and indeed is entitled to the same upon the very marriage.

And with regard to the jointure enjoyed by Lord *Suffolk* during the coverture, that might have determined the next moment after the marriage; though how long soever it continued, it was in the husband's power during the coverture to sell and dispose of it at his discretion.

Upon the whole, it would be a great imputation upon the court in a case thus circumstanced, to make the defendant

[470] the Earl of *Suffolk* liable to the bond of his wife *dum sola*; wherefore as to this, let the bill be dismissed with costs.†

† Agreeable to this resolution and on the authority thereof, was the case of *Heard et Ux'* v. *Stamford et Ux'*, determined by Lord *Talbot* in *Lincoln's-Inn-Hall, March* 8, 1735-6. post. Vol. III. 409. and Ca. temp. Talb. 173. S. C. (*z*)

(*z*) See *Adair* v. *Shaw*, 1 Sch. & L. 263.

2. Ad. & El. 761.

SHORT *versus* WOOD.

CASE 133.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 721. pl. 6. Where money is directed to be laid out in a purchase of land, and to be settled on *A.* for life, remainder to *B.* in tail, remainder to *C.* in fee; if *A.* and *B.* bring a bill for the money, they shall not have it, because of the contingency to *C.* But if money were directed to be laid out in a purchase of land, to be settled on *A.* for life, remainder to *B.* in tail, remainder to said *B.* in fee; *A.* and *B.* bringing a bill shall have the money decreed them.

TRUST money is directed to be laid out in land and settled upon a woman for life, remainder to her first, &c. son in tail, remainder to such son in fee, and in the mean time and until a purchase can be found, the money to be put out at interest, and the interest to go as the profits of the land, &c.

The mother and son (there being only one son) came to an agreement, that this money should be paid, a third to the mother, and two thirds to the son, and bring a bill against the trustees to pay it, who submit to the court, being indemnified.

Lord Chancellor, on hearing this cause by consent said, that Lord *Cowper* had determined, that if a remainder man had but a chance for the estate or the money, which could not be barred without a recovery, there in regard the tenant in tail might die before such recovery suffered, or might die in a vacation, when a recovery could not be suffered, a court of equity, whose business it is to aid the intent of the party ought not, in violation of such intent, to decree the payment of the money to the tenant in tail, but ought to decree it to be laid out in a purchase of land to be settled according to the direction of the party, in order that the chance which was intended the remainder man, might be preserved, and when the settlement was made, the tenant in tail might if he thought fit suffer a recovery. Which matter was so decreed by Lord Chancellor *Cowper* in the case of one Mr. *Colwall* and Dr. *Shadwell*, (*a*) and where the chance afterwards actually happened in favour of the remainder man by the death of the tenant in tail before any recovery suffered.

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(*a*) See the case cited post. 485. in Chaplin v. Horner.

But that in the principal case, where the mother was tenant for life, with remainder to the son in tail, remainder to the same son in fee, so that the son might by a fine only, bar these limitations, and which fine might be levied in vacation time as well as term, it would be in vain for equity to decree a settlement which the same moment that it was made, might be cut off.

Therefore his Lordship directed the trustees to pay the money to the mother and son pursuant to the agreement, and to be indemnified, but said that if there had been two sons or any

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person in remainder, he would not have decreed the payment of this money.

(a) Ante, 90. Legate v. Sewell.

It seems also that if the son had been an infant, (a) the Court would not have ordered the payment of the money; for during the infancy no fine could have been levied. (1)

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(1) Vide *Benson* v. *Benson*, ante 130.

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CASE 134.

WILLIS *versus* LUCAS.

LORD CHANCELLOR PARKER.

10 Mod. 416. 2 Eq. Ca. Ab. 343. pl. 5. 363. pl. 14. Devise of land to the testator's second son for life, he or his heirs paying a rent thereout to the eldest son for his life, and after the death of the second son and his wife, remainder to the first, &c. son of the second son. The wife of the second son had an estate for life by implication, by the opinion of Lord Chancellor Parker. (z)

JOHN Lucas was seised in fee of some houses in *London*, and of some land in gavelkind in *Lewisham* in *Kent*, and having three sons, *John*, *James*, and *Samuel*, made his will, by which he devised all his lands in *Kent* and houses in *London* to his youngest son *Samuel* (the defendant's husband) for his life, he or his heirs paying out of the rents of the premisses 10*l.* a year to the testator's eldest son *John Lucas* for his life, and also 10*l.* a year to the testator's second son *James* for his life, and also 10*l.* a year to the testator's daughter *Mary* (now the wife of *David White*) for her life, also paying his legacies; and that after the death of the said *Samuel Lucas and the defendant* Mary *his wife*, then the son or sons of the said *Samuel* should have all the said premisses equally between them, they or their brothers paying the legacies as abovesaid; and if no such sons, then the daughter or daughters of *Samuel* to have the said premisses equally amongst them, paying, &c.

The testator died, also *James Lucas* died leaving issue, then *John Lucas* the eldest son died, leaving issue a daughter, after which *Samuel Lucas* died, leaving the defendant *Mary* his widow and three infant children, whereupon the daughter of the said *John Lucas* brought an ejectment for the recovery of the premisses against the defendant the widow of *Samuel*, who giving in evidence an old subsisting term of the premisses, the said daughter the heir of the testator's eldest son *John Lucas*,

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preferred this bill in equity for an account of the rent of the premisses against the defendant the widow of *Samuel*, and to set aside the old term which had been made use of against the plaintiff at law.

(z) See 2 Fonb. Eq. 57.

The only question was, whether the defendant *Mary Lucas* the widow of *Samuel* had an estate for life *by implication*, the premisses in question being devised to *Samuel* for his life, and after the death of him *and* Mary *his wife*, then to the sons of *Samuel;* or whether during the life of the wife of *Samuel*, the premisses should descend to the plaintiff the heir at law of the testator, as an estate undisposed of by the will, during the life of *Samuel*'s wife.

It was urged for the plaintiff, that it had been settled by many authorities in the books, *viz.* the 13 H. 7. 17. Jones (Tho.) 98. 2 Lev. 207. 1 Vent. 203. Vaugh. Rep. 259. (*Gardner* v. *Sheldon*) that nothing less than a (*a*) necessary implication could intitle the wife to an estate for life, and the known diversity was, where I devised land to my *heir* after the death of my wife, this is a devise by implication to her for life; but if I devise lands to my *second* or *third son*, after the death of my wife, this is no devise by implication to her, but the lands during her life shall descend to the eldest son as heir.

(*a*) Ante, 39. Philips v. Philips.

And therefore in this case, the devise being to *Samuel* the testator's youngest son for life, and after the death of him and his wife, to *Samuel*'s son or sons, and *Samuel* being dead leaving sons, these were excluded until after the death of the wife, and she could not take, there being no necessary implication that she should; so that in the mean time the premisses must descend to the plaintiff (the testator's heir at law) as an estate undisposed of.

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It was moreover insisted by Serjeant *Cheshire*, that the payments of the several annuities of 10*l.* out of these premisses were out of the case, for whether the wife of *Samuel*, or the heir at law of the testator, was to have the premisses, these several annuities were not to be paid during the wife's life after the death of *Samuel*, it being said in the will that *Samuel or his heirs* were to pay these annuities, and not that *the wife* should pay them.

To all which it was answered, and *Lord Chancellor* so held, that the defendant *Samuel*'s widow was intitled to the premisses during her life by implication.

He observed it had been admitted, that if the devise were to the heir after the death of the wife, in such case she would take by implication; and that in this case it appeared to be equally the intention of the testator, that his heir at law should not have the premisses, and that they should not descend to him; for that the will appointing the heir should

WILLIS v. LUCAS.

have a rent of 10*l.* a year out of the land for his life, plainly implied he should not have the land itself. (*z*)

That these rents were not to sink upon the death of *Samuel*, and during the life of the wife, they being expressly given to the several annuitants (which were three in number) for their lives, and were plainly intended as a certain provision for all these annuitants in all events during their lives; so that it was, as if these several annuities were in the first place given by the will to the several annuitants, and the lands afterwards given subject to these annuities; from whence it seemed to have been the testator's intent, that whoever took the land should pay the annuities, and that *Samuel*'s wife should be liable to the annuities, which appeared in the cause (and without contradiction) to have been all along paid by her since her husband's death.

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In the next place it was argued, that if this point were against the widow, yet still as to the gavelkind lands, (for the (*a*) lands being in *Kent*, must be intended to be gavelkind, unless they appear to have been disgavelled) *Samuel*'s wife must have them all for her life, and not a third only.

(*a*) Sid. 138. 1 Mod. 98.

That in gavelkind all the sons were as daughters or (*b*) coparceners, and if a man had three (*c*) daughters, and were to devise his lands to his third daughter after the death of his wife, she would have an estate for life in the whole by implication; for all the daughters make but one heir, and whatever descended must descend to all of them, for since the lands could not descend to all of them during the wife's life, they could not descend to *any* of them, but the wife should have the whole by implication.

(*b*) Parceners by the custom. Litt. sect. 265.

(*c*) 2 Vern. 723.

That to this effect was the case in *B. R.* (*d*) *Reading* v. *Royston*, in Lord C. J. *Holt's* time, where a man had two daughters, and seised of lands in fee, devised them to one of his daughters in fee; upon which the question was, whether the devisee took the whole by devise, or a moiety by descent; and adjudged on great consideration, that she took the whole by devise; for that one coparcener only could not possibly take by descent, the one daughter not being heir, and whatever descended must descend to both daughters, for it could not descend to one daughter only.

(*d*) Salk. 242.

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So in the present case, these gavelkind lands would not upon the death of *Samuel* descend to the sons of all the three

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(*z*) But see *Camfield* v. *Gilbert*, 3 East, 516. *Kellett* v. *Kellett*, 1 Ba. & Be. 533.

brothers, in regard the sons of *Samuel* were not to take until after the death of *Samuel* and his wife, and if they would not escend to *all*, they could not descend to *any*, and consequently the defendant the wife of *Samuel* should take the whole gavelkind lands during her life.

Lord Chancellor said nothing as to this, but strongly inclined for the defendant the widow of *Samuel*, that she took an estate for life by implication upon the first point. However,

It being matter of law, and an ill-penned will, the Court ordered a case should be made of it, and that it should be referred to the judges of *B. R.*

ANONYMOUS.

CASE 135.

IF one be sued in an inferior court for a matter out of the jurisdiction, the defendant may either have a prohibition, from one of the common law courts of *Westminster Hall*, or in regard this may happen in a vacation when only the chancery iso pen, he may move that court for a prohibition; (*z*) but then it must appear by oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, (*y*) which was refused. And if a prohibition has been granted out of chancery *improvidè*, and without these circumstances attending it, the court will grant a *supersedeas* thereto.

If in an inferior court I am sued for a matter out of the jurisdiction, in vacation time, a prohibition lies in Chancery on affidavit that the matter is out of the jurisdiction; but no affidavit is necessary where, on the face of the declaration, the matter appears to be out of the jurisdiction.

* But in case it shall appear on the face of the declaration, that the matter is out of the jurisdiction of the court, then a prohibition will be granted without oath of having tendered the foreign plea, and in these cases equity imitates the (*a*) common law.

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(*a*) Vide Salk. 549. and post. Saunderson v. Clagget, 657.

And in a late case which was moved the last seal after *Trin.* term, where the court had granted a prohibition to an action brought in the courts at *London*, upon an affidavit that the matter arose out of the jurisdiction, it appearing at another day

By imparling generally you admit the jurisdiction, and cannot afterwards plead a foreign plea. (*x*)

(*z*) As to the jurisdiction of the Court of Chancery in vacation, see *Blackborough* v. *Davis*, ante 43. and *Crowley's Case*, 2 Swan. 1. where the subject is discussed at great length.

(*y*) See *Iveson* v. *Harris*, 7 Ves. 251.

(*x*) See *Brown* v. *Irvin*, *King* v. *Jewell*, *Creese* v. *Irvin*, 7 Ves. 258.

ANONYMOUS. that the defendant had imparled generally (which admitted the jurisdiction), and so could not afterwards be allowed to plead a foreign plea, the court granted a *supersedeas* to the writ of prohibition.

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DE TERM. S. MICHAELIS, 1718.

CASE 136.

BACON *versus* CLARK.

At the Rolls. Pre. Cha. 500. 2 Eq. Ca. Ab. 208. pl. 1. 641. pl. 9. One devises lands to his wife for life, and after her death to his son in fee, upon condition to pay his daughter 1000*l.* within a year after the death of *J. S.* with a proviso that if the money be not paid, the daughter may enter and receive the profits till payment. *J. S.* dies, living the wife; the daughter shall have the 1000*l.* during the life of the mother, and in default of payment equity will decree a sale of the reversion.

ONE seised in fee of some lands in possession, and of other lands in reversion after the death of *A.* and having a son and daughter, devises the lands which he had in possession, to his wife for life, and from and after the death of his wife and also after the death of the lessee for life of the other lands, he devises these respective premisses to his son and his heirs upon condition, "that the son should within a year after the death "of a third person, one *Eliz. Herne,* (after whose life it was "said, but not proved, that the testator had other lands in "reversion) pay 1000*l.* to the said testator's daughter, with a "proviso that upon non-payment the daughter might enter "upon the premisses."

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Elizabeth Herne dies, and a year after her death the daughter marrying brings a bill for a sale of this reversion, in order to raise the 1000*l.* portion and interest from the end of the year after *Elizabeth Herne*'s death.

It was objected for the defendant, that a sale of a reversion was hard in any case, and the heir favoured in law; and if the reversion should be sold to pay this portion and interest, it would destroy the provision for the son, who as *heir* was more to be favoured than a daughter.

That though it was admitted a devise of lands to an heir *upon condition to pay* did raise a trust in equity (the condition being void at law, in regard none but the heir could take advantage thereof), and it being a trust, equity would direct a sale or mortgage to raise the money, yet in this case the

will had prescribed and chalked out a remedy for the daughter's recovery of her portion, *viz. by an entry upon the estate*, and that shewed the daughter was not to have the portion, until the estate was become capable of being entered upon, namely, when the estate in reversion was fallen into possession and the testator having prescribed this remedy, the daughter ought not to take any other; besides, it was unreasonable that the son should pay any thing, until he had received some advantage by the will.

But on the other side it was answered, and decreed by the Court, that a reversion was an estate, and a beneficial one too, and might as well as any other estate, be devised upon condition.

That if the mother or tenant for life were dead, and *Elizabeth Herne* were living, it would be granted the daughter could not recover the 1000*l.* legacy, though the son were by the death of the mother, or of the tenant for life, come into possession: and if so, to tie the daughter down to stay till *Elizabeth Herne* was dead, though the son were come into possession, and on the other hand not to let the daughter have it on the death of *Elizabeth Herne* would be very unequal. [480]

That by the express words of the will the legacy was to be paid to the daughter within a year after the death of *Elizabeth Herne*, and as it was a portion, and a daughter's portion given her by her own father, it was to be favoured.

That supposing it to be a hardship for the son to pay it before such time as the estate given him by the will was come into possession, it might also be a hardship on the other hand, for the daughter to stay until after the death of the mother, who might live as long as herself, and then it would not answer the end of the gift, which was to prefer her in marriage.

But that in truth this was not any hardship; for the legacy would carry interest from a year after the death of *Elizabeth Herne*; which interest when computed by a master, would be made principal and carry (*a*) interest, and so it would be no more a hardship upon the son to sell the reversion *now*, than *after the death of the mother*, when the running on of interest would have increased the burthen. And by the same reason the daughter must stay till both the lives were dropt; that

(*a*) Vide ante, 453, Butler v. Duncombe; post. 653, Brown v. Barkham. (*z*)

(*z*) *Creuze* v. *Hunter*, 2 Ves. jun. 157.

BACON *v.* CLERK.

if the hardship must be on one side or other, the express direction of the testator ought to take place and be pursued.

For which reasons the *Master of the Rolls* decreed the portion to be raised by sale, unless the son should pray it might be done by mortgage.

[481] This decree was appealed from to *Lord Chancellor Parker* who affirmed the same.

CASE 137. SHALES *versus* SIR JOHN BARRINGTON, *et è contra.*

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 237. pl. 8.

SIR *Charles Barrington* had settled an estate upon himself in tail, remainder to his second cousin the defendant (who was presumptive heir to the honour in case of failure of issue male of Sir *Charles*) for life, remainder to the first, *&c.* son of the defendant in tail male, remainder over, with power of revocation reserved to Sir *Charles*, who some time afterwards revoked the old uses, and limited new ones upon his younger sister Mrs. *Shales* for life, remainder to her first and every other son in tail male, they taking the name of *Barrington*, &c.

Then Sir *Charles* died, and the honour descended to the defendant, upon which Mrs. *Shale*'s infant sons brought their bill against Sir *John Barrington* to establish the deed of revocation, and limitation of new uses. And the defendant Sir *John* brought his bill to set this latter deed aside, and to recover some legacies given him and his children by the will of Sir *Charles.*

Afterwards the defendant Sir *John* dying, his two infant sons revived the suit, and entered into very long and expensive examinations; but the deed of revocation and new settlement was fully proved, and the proof against it no ways positive, but circumstantial only, as to several expressions of

[482] Sir *Charles* declaring that he intended his estate should go with his honour, and that it would be a very ill thing in him to do otherwise, &c.

Words no evidence against a deed solemnly executed.

Lord Chancellor: Words can have no weight against a deed so solemnly executed as this. Therefore the deed of revocation and limitation of new uses must stand.

Heir at law, or heir male to the honour of the family, if probable cause to contend for the family estate, shall not pay costs.

But it being insisted, that the defendant ought to pay costs upon his cross bill, so far as it controverted the deed:

His Lordship denied costs; for that though the defendant was not heir at law, yet he was very like one, being heir to the honour of the family; he found by deed an estate vested in him in remainder, and not being privy to the deed of revo-

cation, it was lawful, nay reasonable for him to make this enquiry. Besides, but a small part of the suit was carried on by the defendants' father; and the defendants themselves were infants, and had good ground of suit for their legacies; and a great estate being given from the honour, it was sufficient for the plaintiff *Shales* to go away with such estate, without having costs into the bargain. (1)

(1) Vide *Webb* v. *Claverden*, 2 Atk. 424. *Berney* v. *Eyre*, 3 Atk. 387. *Leman* v. *Alie*, Amb. 163. (*z*)

(*z*) *Forbes* v. *Taylor*, 1 Ves. jun. 99.

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HARRIS *versus* LEE.

CASE 138.

J. S. had given his wife the foul distemper twice, upon which the wife leaving her husband and coming to town to be cured, borrowed 30*l.* of the plaintiff to pay doctors and surgeons and for necessaries, * afterwards *J. S.* devised some lands for the payment of all his debts, and died.

At the Rolls. Pre. Cha. 502. 2 Eq. Ca. Ab. 135. pl. 2. Baron gives feme the foul distemper, *A.* lends the wife 30*l.* to pay the doctor for her cure; Baron devises lands for the payment of his debts; this 30*l.* is a debt of the husband, and *A.* is a creditor in the doctor's place.

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The plaintiff brought his bill against the trustees who were impowered by the will to sell the land for the payment of debts in order to be paid this money, as a debt within the trust.

Objected, A wife cannot by law borrow money, nor contract a debt by borrowing money, even though such money be afterwards applied for necessaries; because it was in her power to waste the money (*a*); and if the *law* be so, it would be hard to have a different rule of property *in equity*.

(*a*) 1 Salk. 387.

Sed per cur': Admitting the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her cure and for necessaries, the plaintiff that lent this money, must in equity stand in the place (*b*) of the persons who found and provided such necessaries for the wife. And therefore, as such persons would be creditors of the husband, so the plaintiff shall stand in their place and be a creditor also, and let the trustees pay him his money and likewise his costs.

(*b*) Vide Marlow v. Pitfield, post. 559.

CASE 139. CHAPLIN *versus* HORNER *et Ux'*.

At the Rolls.

Where money is covenanted to be laid out in a purchase of land, and to be settled on *A.* in fee, the heir, and not the executor of *A.* shall have it. (*z*) But if *A.* himself has received any of this money, this is a good payment, and shall not be repaid by *A.*'s executor to his heir. Also if *A.* in this case dies, *A.*'s heir shall recover the remainder of the money not received by *A.* So if *A.*'s heir is an infant, and the remainder of the money is decreed to be brought into court, it shall be looked on as land.

JAMES Chaplin the plaintiff's father, on his marriage with the plaintiff's mother, (now the wife of defendant *Horner*) in consideration of 3000*l.* portion made a settlement of land to the use of himself for life, * remainder to the wife for life, remainder to the sons of the marriage in tail-male, remainder to the daughters of the marriage in tail general, remainder to his own right heirs: also the plaintiff's father covenanted to lay out 2000*l.* (then in the hands of trustees) in the purchase of lands to be settled on himself and his heirs.

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The marriage took effect, and there was issue thereof only the plaintiff a daughter.

Not long after the plaintiff's father died intestate, but before his death he had received 1350*l.* part of this 2000*l.* which on the marriage was secured on a mortgage from one Mrs. *Avery* the wife's mother, and having received this 1350*l.* laid it out in the purchase of an office for his life.

After his death, his widow the plaintiff's mother took out administration to him, and the plaintiff *Elizabeth Chaplin*, as the only issue and heir of her father, brought this bill to have the covenant in the marriage settlement performed in specie, and likewise claiming two thirds of her father's personal estate under the statute of distribution.

Mr. *Vernon* for the defendant insisted, that the 1350*l.* being paid to the plaintiff's father, who would have had an absolute power over the land if purchased and settled, this payment was a good payment, and ought not to be refunded by his administrator, in order to be invested in land for the benefit of the plaintiff the heir; which was agreed by the *Master of the Rolls*.

He next insisted, that the remaining 650*l.* ought not to be laid out in lands, but to be looked upon as personal estate, and the defendant the widow to be intitled to a third thereof, the old rule of the court being (*a*) that if money were agreed to be laid out in a purchase of lands to be conveyed to *A.* in fee, if *A.* had brought a bill for the performance of this trust,

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(*a*) Vide Seely v. Jago, ante, 389.

(*z*) See *Lingen* v. *Sowray*, ante, 172.

CHAPLIN v. HORNER.

equity would have decreed the money itself to *A.*; nay that formerly the court went further, *viz.* where money was to be laid out in land and settled on *A.* in tail, remainder over, and *A.* brought a bill for the performance of this trust, the court has in such case decreed the money to † *A.* because if the land were bought and settled on *A.* in tail, he might suffer a recovery and bar the intail, and turn the land into money again; so that in the ordering of such purchase and settlement the court would be doing a vain thing; and that this was the practice till Lord *Cowper*'s time, when in the case of *Colwal* and *Shadwell* the court decreed the trust money to be laid out in a purchase of land and settled on *A.* in tail, remainder to *B.* in tail, to the intent that the issue in tail and the remainder man might have the benefit of the chance intended them by the person creating the trust, in case the tenant in tail should die before suffering a recovery or levying a fine.

But that here the plaintiff's father being to be *tenant in fee* of the land when purchased, and having an absolute power over it as well by will as otherwise, and this 650*l.* being as yet actually but money, it should (as he urged) be looked upon only as personal estate.

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But the *Master of the Rolls contra*; that this 650*l.* ought to be taken as land, and go to the plaintiff (*a*) as heir; the dispute in this case being not betwixt the party himself, the father, and the party who was to pay the money, but betwixt the heir and executor, who became intitled to this money subject to the covenant; and it was the rather to be deemed a real estate, because this was part of the marriage agreement, and the covenant was made in consideration of a marriage and a marriage portion.

(*a*) Vide Scudamore v. Scudamore, Pre. Cha. 544. the like determination by Lord Parker.

Wherefore the Court decreed that the 650*l.* should be brought before a Master for the benefit of the plaintiff (being an infant), but would not decree it to be laid out in land, because if the plaintiff should die before such disposition it would go to her heir of course. (1)

† In the case of - - - - v. *Marsh* in *Easter* term, 1723, at the Rolls, where money was articled to be laid out in land, and settled on the first and other son in tail, and the Court, in order to preserve the chance to the second son, would not decree the money to the eldest son, but ordered the same to be invested in a purchase pursuant to the articles; the eldest son got one to lend him a purchase, and to settle it with an intention forthwith to suffer a recovery, and to re-convey the estate back to the seller; and though all this appeared by the Master's report, yet *his Honour* (after some hesitation) allowed it. *Quære*, whether the money might not better have been paid to the eldest son?

(1) Vide *Edwards* v. Countess of *Warwick*, post. Vol. II. 171.

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CASE 140. SIR ROBERT BURDET *versus* HOPEGOOD.

LORD CHANCELLOR PARKER.

One devises, in case he leaves no son at the time of his death, to *J. S.* The testator dies, leaving his wife privement ensient with a son; this posthumous son is a son living at the testator's death, (*z*) and *J. S.* not intitled.

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ROBERT Burdet, esq. in the life-time of Sir *Robert Burdet* the plaintiff's grandfather, being seised in fee of the manor and priory of *Modney* in the county of *Norfolk*, by his will dated 17th *Dec.* 1711, devised the premises, *in case he should leave no son at the time of his death*, to his cousin *Francis Hopegood* and his heirs, and as a reward for the trouble which the testator had given him, and for the many obligations he had to him, gave him all his personal estate, and made him sole executor, and died, leaving his wife * *privement ensient* which child afterwards proved to be a son the now plaintiff.

And one of the questions was, whether *Hopegood* the devisee was intitled to these lands, in regard (as was objected) the testator died without leaving a son at the time of his death?

Hereupon *Lord Chancellor Parker* referred it to the judges of the King's Bench, who were unanimously of opinion, that the plaintiff Sir *Robert* though not born, had yet an existence in the eye of the law, as in *ventre sa mere*, which in many respects was regarded: as if a woman takes poison to kill her child then in her womb, and the child is born alive, and afterwards dies of that poison, the woman is guilty of murder (*a*); also a child in *ventre sa mere* may be vouched, and may

(*a*) Vide Beale v. Beale, ante, 244.

(*z*) A child *en ventre* is now considered for all purposes, either of benefit or detriment, (*Thellusson* v. *Woodford*, 4 Ves. 227. *Blackburn* v. *Stables*, 2 V. & B. 367.) in the same light as if actually born, except in the case of a descent of land. *Goodtitle* v. *Newman*, 3 Wils. 526. It is entitled to a share of portions provided for children. *Beale* v. *Beale* ante 244. So of the personal estate of an intestate, *Wallis* v. *Hodson*, 2 Atk. 115. *Burnet* v. *Mann*, 1 Vez. 156. and of the customary part of the personal estate of a freeman of London, *Walsam* v. *Skinner*, Pre. Cha. 499. It shall take under a devise or bequest to children born in the life-time of the testator, &c. *Doe* v. *Clarke*, 2 H. Bl. 399. *Clarke* v. *Blake*, 2 Bro. C. C. 320. 2 Ves. jun. 673. *Blackburn* v. *Stables*, ub. sup. *Rawlins* v. *Rawlins*, 2 Cox, 425. *Trower* v. *Butts*, 1 S. & S. 181. (which were subsequent to *Freemantle* v. *Freemantle*, 1 Cox, 248.) A devise to its issue is not too remote, *Long* v. *Blackall*, 7 T. R. 100. 3 Ves. jun. 486. *Thellusson* v. *Woodford*, ub. sup. & 11 Ves. 112. 1 N. R. 357. S. C. on ap. A posthumous tenant in tail is entitled to rents accrued between the time of the death of tenant for life, and its own birth, *Basset* v. *Basset*, 3 Atk. 203. Marriage and the birth of a posthumous child are a presumptive revocation of a devise of land. *Doe* v. *Lancashire*, 5 T. R. 49. (As to which see *Cook* v. *Oakley*, ante 302.) As to a devise or bequest to a bastard *en ventre*, see *Metham* v. *Devon*, post. 529. And see *Northey* v. *Strange*, ante, 342.

be a devisee, and it would be hard to disinherit such an only child, nor could it be imagined the testator ever intended so to do.

The certificate of the judges was as follows:

"We are of opinion, that the devise of the said manor "and priory of *Modney*, &c. to *Francis Hopegood* and his heirs, "was not an absolute devise, but subject to the contingency "of the testator's leaving no son at the time of his death. "So that such contingency not happening, the devise to the "said *Francis Hopegood* and his heirs cannot take place; "the testator, as we humbly conceive, having expressed no "intention in the will of disinheriting his only son, the con-"sequence of which is, that Mr. *Hopegood* is not entitled to "the premisses."

John Pratt, *Rob. Eyre*,
Litt. Powis, *John Fortescue Aland*.

With which his Lordship agreed, and accordingly on the 5th of October 1721, decreed the defendant *Hopegood* to deliver up possession of the premisses, and account for the rents and profits which he had received. (1)

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(1) Vide *Beale* v. *Beale*, ante 246. *Honeywood*, Amb. 708. *Cooper* v. *Northey* v. *Strange*, ante, 342. *Mil-* *Forbes*, 2 Bro. C. C. 63. *Clarke* v. *lar* v. *Turner*, 1 Vez. 85. *Bennet* v. *Blake*, ib. 320.

1. Bea. 327.

PIERPOINT *versus* LORD CHENEY.

CASE 141.

LORD CHANCELLOR PARKER.

Pre. Cha. 503. Gilb. Chan. 274. 2 Eq. Ca. Ab. 642. pl. 10. Settlement, wherein the manor of Dale is settled to the use of grandfather for life, remainder to his son the husband for life, remainder to trustees for 1000 years, for raising 20,000*l.* for a daughter, if but one, payable at twenty-one or marriage, and in the mean time 300*l.* per annum for her maintenance, and to be raised by trustees either by rents and profits, or by sale or mortgage, and to be paid quarterly; the first payment to be made at such of the usual feasts as shall next happen after the father's death. Father dies, leaving one daughter and the grandfather living. Bill prayed a mortgage of the reversion for the infant's maintenance, but the court strongly inclined against it. (*z*)

UPON the marriage of the Earl of *Kingston*, eldest son to the Marquis of *Dorchester*, with *Rachel Bainton* the niece of Mr. *Hall*, the said *Rachel* had 2000*l.* a year in land, and 20,000*l.* in money, and the Earl of *Kingston* being an infant, the settlement was made by a (*a*) private act of parliament, whereby (*int' al'*) the manor of *Dale*, &c. in the county of *Lincoln*, being together with the casual profits about 1000*l.* *per annum*, was settled upon the Marquis of *Dorchester* for life, remainder to his eldest son the Lord *Kingston* for life,

(*a*) 9 Annæ.

(*z*) See *Butler* v. *Duncombe*, ante, 448. and the cases cited in note (2) p. 452.

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remainder to trustees for 1000 years, in trust that if it should happen there should be only one daughter by the marriage, such daughter should have 20,000*l.* for her portion at her age of twenty-one or marriage, and in the mean time 300*l.* *per annum* for her maintenance, until the age of twelve years, and afterwards 400*l.* *per annum* until the portion should become due; the maintenance, as well as the portion, to be raised by the trustees either by the *rents, issues and profits,* or
[489] by *sale* † or *mortgage;* the maintenance to be paid quarterly, *and the first of the said* payments to be made *at such of the four usual feasts as should next happen after the decease of Lord* Kingston *the husband.*

Lord *Kingston* died, leaving issue by *Rachel* a son (now Marquis of *Dorchester*) and a daughter named *Frances,* and the Lord *Kingston* the husband being dead about five years, this bill was brought for the 300*l.* *per annum* maintenance money, and to have it raised by *sale or mortgage,* in regard it could not be raised by the *profits,* the grandfather the present Duke of *Kingston* being alive and having an estate for life in the premisses.

For the raising of the maintenance by sale or mortgage, it was urged that whenever the maintenance or provision for children came in question, it always received the most favourable construction that might be: nay sometimes in favour of such provision, the court had offered violence even to the words; and so it was done in the case of *Gerrard* v. *Gerrard* (*a*), where a portion being secured to a daughter upon a trust of a term for years payable at her age of eighteen or marriage, which should first happen after the death of the father and mother, in that case the portion was decreed to be raised for the daughter at her age of eighteen, though in the life-time of her mother.

(*a*) 2 Vern. 458. and cited ante, in Butler v. Duncombe, 451.

And as this had been done in the case of a portion, so *à fortiori* it ought to be done for maintenance, which was more necessary than a marriage portion, in that a child could not
[490] subsist without maintenance or bread, but might live without marriage.

That the hardship of raising a maintenance by the sale of a reversion was not now to be objected, in regard the owners

† In the report of this case in Pre. Cha. it is stated, as if by the words of the act of parliament, this maintenance money was to be raised out of the rents and profits of the term, and that the plaintiff was for having that extended to a sale or mortgage by an equitable construction only; whereas this is a mistake, the words [sale or mortgage] being expressly mentioned in the act. And the reader will observe that good part of this argument is founded thereon.

of the estate, who could put what hardships, conditions or terms they pleased upon it, had ordered the maintenance to commence and be paid at the first quarterly feast after the father's death, and to be raised by profits, sale or mortgage; which must be understood by *profits* if the tenants for life were both dead, or else by *mortgage or sale,* if either of the tenants for life were living; and where these methods were by the express words of a settlement prescribed, it was blotting them out, it was making a new settlement to object to such method of raising the maintenance; for if these words were not to take place, it would be in vain to make settlements; and Sir *Thomas Powis* quoted the case of Lord *Herbert,* decreed by the late *Master of the Rolls,* wherein the late Lord *Herbert* gave his real estate to his nephew, subject to a term for years, which was declared to be upon trust by sale or mortgage, or with the profits, to raise 3000*l.* a-piece for his two sisters, and 100*l. per annum* maintenance money, and the estate happened to be so incumbered with jointures and rent-charges, that there was not enough to pay the maintenance; upon which the Court decreed a mortgage of the term to raise it.

Mortgage of a term decreed to raise maintenance money.

It was admitted that the raising of money upon any reversion was indeed a disadvantageous way of doing it: however, if it could not be raised any other way, it must be raised at a disadvantage.

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On the other side it was said, that in any case to sell a reversion was prejudicial to an estate; but to sell a reversionary interest for maintenance money was never known nor could any precedent be produced for it; especially where it was a matter intirely in the discretion of the court, and where the child had a mother so able to maintain it, a mother who in this case had 3000*l. per annum* jointure.

Reversion never mortgaged to raise maintenance, where the mother was able to keep the child.

That it would be a case of infinite hardship to the estate; for at this rate there must be an annual if not a quarterly mortgage, the maintenance being to be paid quarterly, and in a case too where the interest could not be raised but must be made principal, and this interest must carry interest, and all these mortgages be liable to foreclosures; that it would occasion a plain hardship even to the daughter herself; for the same fund which was to raise her maintenance was also to raise her portion of 20,000*l.* when she should come to age or be married; and if the interest were to break into it by the frequent charges of annual mortgages and loading the estate with interest upon interest, it would then (not being 1000*l. per*

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annum) prove deficient for the raising the portion wherewith the daughter was to be married and preferred in the world.

Also, considering the circumstances of this case, it should be intended that this maintenance money was to be raised when the term commenced, or upon the death of the father, by which the term came into possession, so as to yield rents and profits, which was one of the methods whereby the maintenance was to be raised.

[492] That at least there could be no colour to ask for the whole 300*l. per annum,* but only for so much as it might be reasonable actually to lay out in her maintenance, regard being had to her tender years.

To which it was replied, that the other side were arguing against the express direction of the act of parliament, for the plain words of it told both *how* and *when* the maintenance was to be raised; how? by rents and profits, sale or mortgage; when? why the first quarter day after the death of the father.

That the act of parliament saying the maintenance should be raised by profits, *sale or mortgage,* if it could not be raised by profits, (because but a reversion) it must necessarily be raised by sale or mortgage; that the act expressly said so, the parties interested in the estate, and who had a power over it had so settled it, and then it could be no hardship when consented to by all parties; and this was now not a matter discretionary, but *de jure* and of right, *ex debito justitiæ,* which the court cannot refuse, a matter of trust being as much a (*a*) right as a legal interest, and it would be in vain to make settlements, if the plain words of them were not to be observed, and from which, if a deviation were to be once allowed, none would know how to give an opinion thereupon; and as to the other side's demanding precedents, *they* ought to shew precedents, where a settlement or act of parliament ever spoke so plain, and yet did not prevail.

(*a*) Vide post. Sandys v. Sandys, 707.

That as to the charge of frequent and annual or quarterly mortgages, it was near five years since the father's death, and yet till now, no mortgage had been demanded, and when a mortgage was made it might be for so much as should be [493] sufficient to maintain the child for three or four years, and in the mean time part of the money raised might be put out.

And with regard to the argument, that this might hinder the raising the *portion,* that might *never* happen to be due, whereas the maintenance was *already* due. And to say, that what was *now* due, and for maintenance too, should not be

raised, because it might hinder what might *never* be due, was strange arguing; indeed if the former was not to be paid, the latter was not likely to be ever due, for the child must be starved and never live to have her portion.

Then as to the mother's jointure, though allowed to be large, it was however agreed and intended that the mother should have it clear; and yet she maintained the son, whose education by reason of his great birth must be very chargeable, and this was a load upon the jointure, in respect to which the more liberal maintenance ought to be made to the mother; as it was (*a*) usual for the court to allow a parent the greater maintenance for the heir, when younger children were left unprovided for.

(*a*) Vide Vol. II. 22. Harvey v. Harvey.

Infant's good to be considered in raising of her maintenance money.

Lord Chancellor: I shall consider the infant's good, and take care that her demand of maintenance shall not defeat her other demand of her portion, it being one and the same fund that is to provide both. It is a hard case to mortgage a reversion, heap interest upon interest, and subject the estate to a foreclosure, for it may come to such a sum as that many persons may be under a necessity of calling in their money.

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Though I admit I must take the act as I find it, *viz.* the first quarter-day after the death of the father, the maintenance money is to be raised by profits, mortgage or sale: yet this court, which is the guardian of the infant, must consider the good of the infant, and it may be for her plain benefit and a kindness to her, that her maintenance should not be raised.

Wherefore let the Master see what is the value of the estate charged with the maintenance and portion, together with the incumbrances that are upon it, and this will influence my judgment.

In the mean while I cannot but observe that the method proposed by Mr. *Vernon* for raising at first more money than there might be occasion for, to prevent frequent mortgages, and to put out the residue for which there should not be a present occasion, would not answer the inconvenience; for the money thus raised, and for which the estate would be loaded with interest, must for some time lie dead in the Master's hands.

And as in the case of *Corbet* and *Maidwell,* Lord *Cowper* declared he would not go beyond the established precedents in cases of that nature, as taking it that the court had already gone too far, so I for my part shall observe the same rule, not having been able to find one single precedent for mortgaging

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(a) a reversion for maintenance, and what makes it still less reasonable to do so in the present case is, that the noble Duke the grandfather has offered in court to maintain both the young Marquis the son and the Lady *Frances* the daughter.

(b) Vide Ravenhill v. Dansey, post. Vol. II. 180.

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CASE 142.

1920. 1. Ch. 323.

ANONYMOUS.

At the Rolls. As legatees are to be paid in proportion, so if an executor pays one legatee, and there is not enough to pay all, the legatee who is paid shall refund in proportion; so if one legatee recovers his legacy in equity, and there is not enough to pay the rest, he shall refund; *secus* if the defect of assets arises by the wasting of the executor.

IN this case (*int. al'*) it was said by Sir *Joseph Jekyll, Master of the Rolls,* that as all legatees are on a deficiency of assets to be paid in proportion, so if the executor pays one of the legatees, yet the rest shall make him refund in proportion; nay, if one of the legatees gets a decree for his legacy, and is paid, and afterwards a deficiency happens, the legatee who recovered shall refund notwithstanding, in imitation of the spiritual court where a legatee recovering his legacy is made to give security to refund in proportion, if, &c. (*b*)

(*b*) Vide 1 Vern. 26. and 93.

3. Eq. 113.

But if the executor had at first enough to pay all the legacies, and afterwards by his wasting the assets occasions a deficiency, in such case the legatee who has recovered his legacy, shall not be compelled (1) to refund, but shall retain the advantage of his legal diligence, which the other legatees neg-

(1) So, in *Walcot* v. *Hall*, (*z*) before Sir *Lloyd Kenyon*, Master of the Rolls, sitting for the Lord Chancellor, 23 Feb. 1788, *J. Pearce* by will, gave to the plaintiff 50*l.* to be paid to him at his age of 21 years, or day of marriage, the same to be put out at interest in the name of his executor, *Charles Pearce Hall*, &c. he then disposed of the residue, and appointed *C. P. Hall* executor. *Hall* proved the will, retained the 50*l.* for the plaintiff's legacy, and paid over the residue to the residuary legatees, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of 21 filed this bill against the executor and the residuary legatees for payment of the legacy. His Honour said the residuary legatees could not be liable; that the distinction was between the cases, where there was originally a deficiency of assets, and where the executor had wasted them; in the former case, a legatee, who had been paid more than his proportion, must refund to the others; but here the residuary legatees had received no more than they were intitled to, and the executor was therefore the only person to be resorted to. And his Honour being of opinion, that this demand, as against the executor, was barred by his certificate, dismissed the bill. Sed vide *Orr* v. *Kaimes*, 2 Vez. 194.

(*z*) 2 Bro. C. C. 305.

lected by not bringing their suit in time; before the wasting by the executor; whereas if the other legatees had commenced their suit before such waste committed, they might have met with the like success, *et vigilantibus non dormientibus jura subveniunt.* ANONYMOUS.

This case I put to Mr. *Vernon*, who was of the same opinion.

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TURTON *versus* BENSON.

CASE 143.

At the Rolls. 2 Vern. 764. Gilb. Chan. 288. 1 Eq. Ca. Ab. 45. pl. 5. 88. pl. 2. Pre. Cha. 522. 10 Mod. 455. 1 Stra. 240.

A son on his marriage is to have 3000*l.* portion with his wife, and privately, without notice to his parents (father or mother) that treated for the marriage, gives a bond to the wife's father to pay back 1000*l.* of the portion seven years afterwards; this bond void in equity, and will not be made better by being assigned to creditors.

MR. *Turton*, barrister at law, treated for his marrying Mr. *Benson*'s daughter, and Mr. *Benson* the father proposing to Mr. *Turton*'s mother to give his daughter 3000*l.* Mr. *Turton*'s mother, though she at first thought it too little, yet afterwards came into the match, and agreed to settle part of her jointure upon her son *Turton* in possession, and in the marriage writings under the hand and seal of Mr. *Benson* it was mentioned that his daughter's portion was to be 3000*l.* but before the marriage it was privately agreed betwixt Mr. *Turton* and Mr. *Benson* that Mr. *Turton* should give a bond to Mr. *Benson*, to pay back to him 1000*l.* at the end of seven years without interest, of which bond Mr. *Turton*'s mother had no notice.

3. Bea. 362. 1712. 1. K. 93. 18.

The marriage took effect, and Mr. *Benson* owing to Sir *Theodore Janssen* 2000*l.* assigned over Mr. *Turton*'s bond to Sir *Theodore*, as an additional security. Mr. *Benson* died; Sir *Theodore*'s demands were afterwards paid, and Mrs. *Benson*, the widow and administratrix of Mr. *Benson*, assigned Mr. *Turton*'s bond in trust for the benefit of Mr. *Benson*'s creditors who were many, and (as it was said) more than his assets could pay.

Mr. *Turton* brought his bill to be relieved against this 1000*l.* bond, and *Benson*'s creditors a cross bill to have the benefit of it; the cause had been greatly debated before the *Master of the Rolls*, who relieved against the bond by granting a perpetual injunction thereupon.

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One having a bond, receives the money due upon it, and afterwards assigns it for a valuable consideration as unsatisfied to another, who has no notice of the payment; yet the purchaser can have no avail of this bond.

His Honour declared that the creditors of *Benson* could not be in a better condition than *Benson himself:* and as to Sir *Theodore Janssen*, it was to be considered he had no legal title

TURTON v. BENSON.

to this bond, but only an equitable assignment; and therefore having a security which was not good in equity, he could not be in a better condition than *Benson* himself was; that supposing a man should assign over a satisfied bond as a security for a just debt, the assignee could not set up this bond in equity, which being satisfied before, could receive no new force from the assignment.

That it was incumbent on any one who took an assignment of a bond to be informed by the obligor concerning the *quantum* due upon such bond, which if he neglected to do, it was his own fault, and he should not take advantage of his own laches.

And with respect to what had been proved, that Mr. *Turton* had since his father in law *Benson*'s death promised to pay back part of this bond, or a debt secured thereby, this was not to be regarded; Mr. *Turton*'s offers made and not accepted signified nothing; that Lord *Cowper* had often (*a*) said a man should not be bound by an offer made during a treaty which afterwards broke off, or upon terms that were not accepted.

(*a*) Vide Harman v. Vanhatton, 2 Vern. 717.

That in cases of this nature, not only the plaintiff himself who gave the bond, but the father or parent treating the match would be intitled to relief; as for instance, suppose a parent were to settle land upon the marriage of his son, and the son should privately agree to pay back part of the fortune, the parent in that case would be relieved against such agreement.

[498] But more particularly in the principal case, there having been an underhand agreement made with the plaintiff without the privity of his mother, and after the plaintiff's affections were settled (which was taking advantage of the passions of mankind), the *Master of the Rolls* decreed the plaintiff should be relieved and the bond delivered up.

Ld. Chancellor PARKER.

From this decree there was an appeal to *Lord Chancellor Parker*, who in *Michaelmas* term 1719 affirmed it, saying that these private agreements (1) obtained from the intended husband without the privity of his parent were highly to be discouraged.

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(1) So, *Peyton* v. *Bladwell*, 1 Vern. 240. *Redman* v. *Redman*, ib. 348. *Gale* v. *Lindo*, ib. 475. *Lamlee* v. *Hanman*, 2 Vern. 499. *Keat* v. *Allen*, ib. 588. *Pitcairne* v. *Ogbourne*, 2 Vez. 375. *Neville* v. *Wilkinson*, 1 Bro. C. C. 543. See more on this subject. *Roberts* v. *Roberts*, post. Vol. III. 66.

1*st*, That the parties themselves to this agreement were intitled to relief, for so were all the precedents; and if they should not, there would often be no redress at all against the fraud nor any body to ask it.

And 2*dly*, the parent, as a purchaser of the portion to his child, by settling lands, or bestowing a pecuniary advancement upon him on his marriage, must also be relieved.

That it was no argument to say *Turton* was in fault; for admitting that were true, what reason was there that *Benson* who was in fault also, should be excused? And when *Benson* had been guilty of this fraud to *Turton*'s mother, it was not reasonable that any act done by himself should shelter him, for by this means *Benson* by his own act would be too hard for the Court. [499]

As to *Benson*'s pretended assignment of the bond, it was upon no consideration; but if it were, yet in truth it was not an assignment, but an agreement only that the assignee should have all the fair and equitable advantage and benefit of the bond that the assignor himself (1) was intitled to; and if nothing was due, nothing could be assigned over. Not that this bond given by *Turton* was so absolutely void, as that it might not upon some new consideration or deliberate act have been made good, but no such act appeared.

And with regard to what Mr. *Turton* said to *Richardson* (who it seems was one of Mr. *Benson*'s creditors, and had joined in a bill against Mrs. *Benson* in order to have the benefit of the bond) that he would not set aside his bond, it was indeed generous, but no more than *nudum pactum*.

Also as to what had been urged, that the creditors of *Benson* were numerous and in danger of losing their debts through a deficiency of assets, that could be of no weight, for still the creditors of *Benson* must be paid out of *Benson*'s estate and not out of the estate of *another* man; and where it is said that creditors ought to be favoured, this must be meant with regard to the testator's assets, not to any effects which the testator has wrongfully taken away or tortiously possessed himself of belonging to another.

Therefore affirm the decree.

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(1) *Hill* v. *Caillovel*, 1 Vez. 123.

2 Keen. 618.

CASE 144.

TISSEN *versus* TISSEN.

At the Rolls.

One devises his personal estate to his son, and if his son die within age and without issue, then the personal estate to go to the testator's brother; the son shall have the produce of the personal estate, and only the capital in case of the infant's death, &c. shall go to the brother.

FRANCIS Tissen the elder had four sons, *Francis, John William* and *Samuel*, and by his will dated the 19th of *August* 1710 gives several lands of considerable value to his three younger sons severally at their respective ages of twenty-four years, and appoints that none of his said three younger sons shall take any of the rents and profits of the estates thereby to them devised, until they severally attain the age of twenty-four years, but that his eldest son *Francis* (who was his executor) shall take the rents and profits of the said several estates to his own use, until the testator's said three younger sons should attain their several ages of twenty-four. Soon after this the testator dies.

One devises land to his younger sons at twenty-four, and in the mean time the rents and profits of the premisses to his eldest son, and dies, and the eldest son devises all those rents and profits of the premisses to his younger brothers, but not to be paid to them until twenty-four, and dies, leaving his younger brothers under twenty-four; only the rents and profits accruing from the death of the elder brother, the testator, shall pass.

28th *October* 1717, *Francis Tissen* the son makes his will, and thereby gives all his personal estate and the produce thereof (his debts, legacies and funerals being paid) to the child his wife was then *ensient* with; if one son, then to such son, his executors, administrators or assigns, and if more than one son, and the first son should die before twenty-one or marriage without issue, then his personal estate to go in succession to the sons of his body; but in case there should be no such son, or all such sons should die before twenty-one or marriage without issue, then he gives it to his executors and administrators, and intails all his real estate on such son and his issue male, and in default of such issue, * to his said three younger brothers successively, with remainder to his own right heirs.

[*501]

Also the said *Francis Tissen* the son by his will reciting his father's will as to the devise to the three younger sons, and that he the said eldest son (the now testator) should take the rents and profits to his own use until his three younger brothers should come to twenty-four, now devises to his said three younger brothers respectively *all* the rents and profits of their respective estates so devised to him by their said father until their respective ages of twenty-four; but not to be paid them until twenty-four; and leaves his three brothers *John, William* and *Samuel* executors, and soon after dies.

The widow of *Francis Tissen* the son, was afterwards deliver

ed of a son the plaintiff *Francis Tissen* the infant, who now brought this bill for an account, and to have directions touching his father's estate. TISSEN v. TISSEN.

And the cause coming on to be heard before the *Master of the Rolls*, he decreed that no more than the principal money of the said testator *Tissen* [the son's] personal estate should go over to the testator's three younger brothers, in case the plaintiff the infant should die under age and unmarried without issue; and declared that the interest which should be made of this principal money did belong in (1) all events to the plaintiff the infant grandson, and should be placed out from time to time for his benefit.

And as to the estates devised by *Tissen* the father's will, the profits whereof the testator had given to his eldest son *Francis* for his own use, and without account until the younger sons should respectively attain their ages of twenty-four years, [502] and which *Francis Tissen* the son gave to his said three younger brothers, it was declared by the decree that these rents and profits were to commence only from the death of the plaintiff the infant's father, and not from the death of *Francis Tissen* the grandfather.

Upon this cause's being brought by appeal before *Lord* (*a*) *Chancellor Parker*, (*a*) Jovis, 11 Decem.

1*st*, It was objected that in case of the death of *Francis Tissen* the grandson under age, unmarried, and without issue, by the will of *Francis Tissen* his father, not only the principal money but also all such profits as should be made thereof in the grandson's life-time, should go to the appellants *John*, *William* and *Samuel* the uncles: for the design was to amass an estate together, and when he gave his personal estate with the produce of *it* to the son that his wife was then *ensient* with, and if no son, or if that son should die before twenty-one or marriage, and without issne, then he gave it to his executors, the word [it] comprehended the whole legacy given to his son, and imported as well the whole produce of the personal estate, as the personal estate itself.

But *Lord Chancellor contra*: The son shall have the profits to himself, but the personal estate, *i. e.* the whole capital stock shall go over in case of the son's death unmarried without issue, and under twenty-one. Anciently the notions were that a personal thing given to one for life, or even for

(1) Vide *Nicholls* v. *Osborn*, post. Vol. II. 419.

TISSEN *v.* TISSEN.

a day, was a gift for ever, and would not bear a limitation over; but the construction has since been that such devise passes only the use and profits and not the thing itself †,

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and so it is made good that way. But in this case even the use and profits are denied to pass notwithstanding what has been urged by the other side; and it is the stronger because the word [produce] is left out in the limitation over, which shews a variation of the intention; and to make the rents and profits of an estate to go over, there ought to be very express words.

2*dly*, It was objected that the testator *Tissen* [the son] having by his will recited his father's will, whereby the father gave him the profits of his younger brothers' estates until their ages of twenty-four years, and restrained the younger brothers (the now appellants) from receiving the same until that time; and *Tissen* the son devising all those profits to his younger brothers respectively; this passed the profits taken by himself even from his testator's death; and that the testator the son did this the rather, as being sensible it was a hardship upon his brothers that they should have but 50*l per annum* a-piece until twenty-four; and therefore the will of the son was a *renunciation* of the bequest made to him by his father.

Sed per Curiam: This will can never be construed to pass the profits which were before received by the testator the son, and which when received were properly no longer rents and profits, but passed into other things; the testator the son could not intend to make himself a debtor and accountant to his younger brothers for what he had before received, for if he had so intended he would have made use of plainer words for that purpose.

One possessed of a term for years, devises all the profits thereof to *J. S.* only the profits accruing from the death of the testator shall pass.

If a man be possessed of a term for years and devises *all* his term, this must be understood only so much of the term as shall be to come at his death, at which time the will begins to speak and to take effect; * and so here though the devise is of *all* the rents and profits of the respective estates, yet this cannot be intended to have any retrospect, but to operate only from the death of the testator. (1)

[*504]

† See the case of *Hyde* v. *Parrat*, ante, 1. and *Upwell* v. *Halsey*, post. 651.

(1) Reg. Lib. B. 1718. fol. 54.

FOUNTAIN *versus* CAINE AND JEFFS.

CASE 145.

At the Rolls.

Where there is a decree nisi causa against an infant, on such infant's coming of age, and before the decree made absolute, he may put in a new answer.

ONE seised in fee devises his lands to his wife for the payment of his debts, and dies, leaving an infant daughter and heir.

The bill was brought by the creditors for the sale of the estate, and the infant heir made a defendant, who answers by guardian, and the estate is decreed to be sold, the other defendant *Jeffs* being a purchaser under this decree, which as to the infant heir is only *nisi causa*.

Afterwards and before the decree was made absolute the infant coming of age moved the *Master of the Rolls* that she might be at liberty to put in a new answer, and thereby set forth her right to the premisses, which (as it was alledged) was not fully done by the former answer.

But the counsel who moved it not being fully instructed, and his Honour thinking this motion to be somewhat special, ordered it to be moved again.

Accordingly, at another day the same motion being made, the *Master of the Rolls* said that he had been attended with a case wherein his predecessor (Sir *John Trevor*) upon a petition *ex parte* only, made an order that an infant coming of age might put in a new answer; and that upon better information he understood it to be a matter of course, and that there was no other way than this for the infant to set forth his title which he ought to have an opportunity of doing. (1)

[505]

That there was no reason why he should be bound by the answer of his guardian, for that would be, at the same time that the Court gave him liberty to shew cause, to tie up his hands from shewing cause.

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(1) So, *Napier* v. *Lady Effingham*, post. Vol. II. 401.—*Bennet* v. *Lee*, 2 Atk. 531. And exceptions cannot be taken to an infant's answer. *Strudwicke* v. *Pargiter*, Bunb. 338. (*z*)

(*z*) And see *Copeland* v. *Wheeler*, 4 Bro. C. C. 256. *Lucas* v. *Lucas*, 13 Ves. 274. *Savage* v. *Carroll*, 1 Ba. & Be. 553.

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2 Eq. Ca. Ab. 224. pl. 5, 6. One seised in fee of the manors of A. and B. mortgages A. for 4000*l.* and by will charges all his real estate with payment of his debts, and devises A. to C. and B. to D. and dies; the devisee of A. shall compel the devisee of B. to contribute to pay the mortgage on A.; but if the will proves void, then no contribution.

SIR *Michael Armin* being seised in fee of the manors of *Pickworth* and *Willoughby* in *Com. Linc'*, by his will dated 30 *March* 1668, devised that in case his personal estate and his estate in *Orton* in *Com. Huntingdon* should not be sufficient to pay his debts and legacies (as in fact they were not), then his executors should receive the profits of his whole real estate for the payment of his debts and legacies, and after those should be paid, he devised the manors of *Pickworth* and *Willoughby* to his uncle *Evers Armin* for life without waste, and in case his uncle *Evers* should have issue male, then to such issue male and his heirs for ever, and after the death of the said *Evers* in case he should leave no issue male, and after debts and legacies paid, he devised his manor of *Pickworth* to his nephew *Thomas Styles* in fee, and that of *Willoughby* to his nephew Sir *Thomas Barnadiston* in fee, and made the said *Evers Armin*, Sir *Thomas Barnadiston*, *Thomas Styles* and *Thomas Bristow* executors.

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1914. 1 Ch. 281.

Afterwards 11 *June* 1668, the testator Sir *Michael Armin* mortgaged *Pickworth* to the Lady *Diana Hollis* for the term of 1000 years, for securing the sum of 4000*l.* and interest, and in the *December* following died, leaving *Susanna* and *Anne Armin* (the daughters and coheirs of his elder brother Sir *William Armin*) his heirs at law.

It was admitted that the 4000*l.* debt due from Sir *Michael Armin*, by mortgage of *Pickworth*, was one of the debts charged by Sir *Michael*'s will upon the real estate. And after the death of Sir *Michael Armin*, *Evers Armin* one of the executors and devisees in the will of Sir *Michael*, entered upon the premisses called *Pickworth* and *Willoughby*, and received the profits, applying them to his own use, saving that he kept down the interest of the mortgage on *Pickworth*.

In *January* 1675, *Evers Armin* suffered recoveries of both the manors of *Pickworth* and *Willoughby* wherein he was vouchee, which were to the use of himself the said *Evers Armin* and his heirs, and at the time when these recoveries were suffered, both the co-heirs of Sir *Michael*, *viz. Susanna* afterwards Lady *Bellasis*, and *Anne* afterwards Countess of *Torrington*, were of age and unmarried.

Afterwards *Evers Armin* made his will dated 19th *Octob.*

1677, and devised his two manors of *Pickworth* and *Willoughby* to his grandson *Armin Bullingham* and the heirs of his body, remainder to his grand-daughter *Elizabeth* (1) *Saunders* (now *Elizabeth Mortimer*) and her heirs; and 2d *June* 1680 died, at which time both the heirs at law were under coverture; upon which decease of *Evers Armin* no person for some time entered upon *Pickworth*, but at length *Heneage* (the assignee of Lady *Diana Hollis*'s mortgage) entered thereupon; and as to *Willoughby*, Sir *Thomas Barnadiston* entered upon it immediately after *Evers Armin*'s death, claiming the same by virtue of the remainder limited to him by the will of Sir *Michael Armin*.

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2d *March* 1688. Sir *Thomas Barnadiston* mortgages *Willoughby* to Sir *Richard Rothwell* for 4000*l.* for the term of 1000 years, and gives a statute in 8000*l.* penalty for the performance of covenants.

10th *Nov.* 1691. *Armin Bullingham* (the devisee of *Evers Armin*) entered upon the manor of *Willoughby* claiming title thereto, and put his cattle into some part of the land, upon which ensued a replevin and the special verdict, in 3 Lev. 431. and Salk. 224. (*z*)

By lease and release 7th and 8th *July* 1697. Sir *Thomas Barnadiston* mortgaged the premisses to Sir *Samuel Barnadiston* and his heirs, to secure 2000*l.* and by the usual proviso at the end of the mortgage it was agreed that Sir *Thomas Barnadiston* should continue in possession till breach of the proviso.

In *Jan.* 1697, the suit was compromised between Sir *Thomas Barnadiston* and *Armin Bullingham*, who in *Hilary* term the same year both joined in a fine and recovery of the manor of *Willoughby*, in which they were both vouched, and the use was declared that *Armin Bullingham* should have a rent-charge of 250*l.* *per annum* in fee-simple issuing out of the manor of *Willoughby* with power of distress, and the said manor

(1) There was no limitation to *Elizabeth Saunders*, but the remainders after the estate tail to *Armin Bullingham* were to the *heirs male of the body* of *Elizabeth Saunders*, and in default of such issue to the heirs of her body, with remainder to the testator's own right heirs, and *Elizabeth* claimed as right heir of *Evers Armin*, Reg. Lib.

(*z*) 1 Ld. Ray. 203. And see *Doe* v. *Holmes*, 3 Wils. 237. 246. 2 Bla. Rep. 777.

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therewith charged was limited to the use of Sir *Thomas Barnadiston*, and his heirs, which recovery barred the remainder in fee limited to *Elizabeth Saunders* as to the manor of *Willoughby*; but there was no recovery suffered of the manor of *Pickworth*.

[508] In *August* 1701, Sir *Thomas Barnadiston* died, leaving the defendant Sir *Thomas Barnadiston* his son and heir; the same month also *Armin Bullingham* died without issue; whereupon the rent-charge of 250*l*. *per annum* descended to *Nicholas Bullingham* his cousin and heir; and *Pickworth* was claimed by *Elizabeth Mortimer* grand-daughter and heir of *Evers Armin* [and late *Elizabeth Saunders*.]

By indenture of bargain and sale inrolled *Nicholas Bullingham* sold and conveyed his rent-charge in fee of 250*l*. *per annum* and the arrears thereof, to *John Coppen* and his heirs for 3500*l*.

The defendant *Samuel Barnadiston* claimed by *mesne* assignments the mortgages made of *Willoughby* to Sir *Richard Rothwell* and Sir *Samuel Barnadiston*, and the statute staple for 8000*l*. for performance of covenants: Afterwards *Samuel Barnadiston* and *Coppen* (the latter having commenced a suit in equity for the recovery of his rent-charge by reason of the prior incumbrance of *Rothwell*'s mortgage) came to an agreement and obtained a decree by consent, by which the manor of *Willoughby* was decreed to be sold, and *Coppen* to be first paid 7000*l*. (being the computed value of the rent-charge, and arrears), and afterwards *Samuel Barnadiston* was to be paid what was due to him.

The plaintiff *Carter* claiming title to *Pickworth* under *Thomas Styles* the devisee in remainder, brought his bill in *Easter* term 1712, against all the claimants, *viz.* against *Heneage* the mortgagee, to have a redemption of that mort-

[509] gage, and as against the defendants *Mortimer* and his wife, to controvert with them the right of redemption of *Pickworth*, in regard *Mortimer* and his wife claimed *Pickworth* as heir at law of *Evers Armin*, and against *Coppen* and the *Barnadistons*, who claimed estates and interests in *Willoughby*, to have a contribution from *Willoughby* of its proportion of the debt of 4000*l*. and interest, and to reimburse *Pickworth* what that had paid more than its share, the testator Sir *Michael Armin*, having by his will charged all his real estate with the payment of his debts.

On hearing this cause 2 *March* 1714 before *Lord Chancellor Cowper*, it was decreed that as against *Mortimer* and

his wife, the plaintiff *Carter* should be admitted to a redemption of *Pickworth;* and that as against the other defendants he should have a contribution out of *Willoughby*, in order to reimburse *Pickworth* what that had paid beyond its proportion. (1)

22d *May* 1717, on an appeal of the defendant *Coppen*, Sir *Robert Barnadiston* and *Samuel Barnadiston*, to the House of Peers, the Lords upon taking the advice of all the judges were of opinion, that neither the appellants as claiming under *Evers Armin*, nor the respondent *Carter* as claiming under *Thomas Styles*, had any title; that the executors of Sir *Michael Armin* had only a (*a*) chattel interest for payment of debts, that the freehold was well (*y*) vested in *Evers Armin*, and that the remainder to *Thomas Styles*, in default of *Evers Armin*'s leaving a son, was a contingent remainder, and consequently barred by the recovery suffered by *Evers Armin*, and therefore that the plaintiff *Carter* claiming under that remainder to *Styles*, had no title, nor any right to a contribution out of *Willoughby*; whereupon * they reversed Lord *Cowper*'s decree, but in their decree of reversal declared, that this reversal should be without prejudice to the right of the heirs at law of Sir *Michael Armin* or *Evers Armin* to have such contribution. (2)

One devises lands to his executors, for and until payment of his debts: this is but a chattel interest. One seised of the manors of A. and B. devises these manors to *C.* for life, and if *C.* shall have issue male, then to such issue male and his heirs for ever, and if *C.* should leave no issue male, then the manor of A. to *J. S.* in fee, and the manor of B. to *J. N.* in fee. *C.* suffers a recovery of those manors: this will bar the contingent estates limited to *J. S.* and *J. N.*

(*a*) Vide 2 Vern. 404. (*z*)

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In 1712, *Susanna* one of the co-heirs of Sir *Michael Armin* who was called Lady *Bellasis*, and who had afterwards married *James Fortrey*, died without issue, her husband *Fortrey* surviving; and *Anne* the other daughter, who first married Sir *John Woodhouse*, and afterwards Lord *Crew*, and after that Lord *Torrington*, surviving her sister the Lady *Bellasis*, did by deed of bargain and sale inrolled, and by deed of feoffment convey the manors of *Willoughby* and *Pickworth* to the plaintiff *Carter* and his heirs.

Whereupon the plaintiff *Carter* brought a new bill in equity

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(1) And his Lordship's opinion as to the point of contribution is not shaken by any of the subsequent proceedings in the case, since by the *ultimate* decision of it, the question did not arise between the two devisees. Vide post. 531. See more as to contribution, &c. in *Howel* v. *Price*, ante 295. (note).

(2) *May* 22d 1717. 2 Bro. P. C. 1.

(*z*) *Doe* v. *Simpson*, 5 East, 162. *Doe* v. *Nicholls*, 1 B. & C. 342.

(*y*) *Marshall* v. *Holloway*, 2 Swan. 446.

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against the now defendants as to *Pickworth*, to have the right of redemption betwixt him and *Mortimer* and his wife settled; and if the right of redemption should be decreed to *Mortimer* and his wife, then to compel them to redeem *Pickworth* or to be foreclosed; and as to *Willoughby* (the plaintiff *Carter* having now bought in the right of the testator Sir *Michael Armin*'s heir at law) that the defendants who had been in possession thereof might account for the rents and profits, and that the plaintiff *Carter* might have the possession of *Willoughby* delivered to him; or if it should appear that his title to *Willoughby*, or any part thereof, was barred, that then the plaintiff *Carter* might have a contribution thereof from *Willoughby*, or such part thereof as was so barred, towards satisfaction of the debt of 4000*l.* and interest due on the mortgage of *Pickworth* and to reimburse *Pickworth* what it had paid more than its share.

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This cause had been often very solemnly debated before the *Master of the Rolls*, who on the 10th of *March* 1718, delivered his opinion. (1)

Devise to *A.* for life, remainder to the right heirs of *J. S.* (who is then living); the fee-simple descends to the heir at law of the testator till the contingency happens.

He held, as the Lords, by the assistance of the Judges, had before resolved, that the remainders limited to Sir *Thomas Barnadiston* and *Styles* were contingent remainders, and destroyed by the common recovery suffered by *Evers Armin;* and the question now being whether the remainder in fee was in abeyance, or did descend to the testator Sir *Michael*'s heir at law, *his Honour* thought that here could be no question, but that as by feoffment and other common law conveyances, the remainder in fee might be put into abeyance (according to 1 Inst. 342, 343.) so it might be also by a devise.

That the statute of wills (32 Hen. 8.) enabled every body seised in fee of lands, to dispose thereof by will according to his pleasure; so that by that statute the testator might mould and dispose of his lands in what manner and form he thought fit, provided it were conformable to the rules of law.

And that if by a common law conveyance, the owner of land might make contingent remainders, and place the fee in abeyance, *à fortiori* might he do so, if he thought proper, by will, for which he cited 2 Mod. 291, 292. *Taylor* and *Bidulph*'s case, where C. J. *North* says, that a contingent remainder may arise by conveyance as well as by will, and (speaking of devises) observes, that one may devise lands to an infant *in*

(1) Reg. Lib. A. 1718. fol. 252.

ventre sa mere, and this will be good by way of executory devise; but (says Lord *North*) if an estate be given to *A.* for life, remainder to the right heirs of *B.* (which must be intended of a devise, for he was speaking of wills for some time before) in such case this is a contingent remainder, and void if *A.* dies during the life of *B.* for that the fee does not descend during the life of *B.* to support the contingent remainder. [512]

That as to the cases of *Plunkett* and *Holmes*, 1 Lev. 11. 1 Sid. 47. Raym. 28. and of *Purefoy* and *Rogers*, 2 Saund. 380. 2 Lev. 39. 3 Keb. 11. (which were cited as in point to prove the fee descended to the heir at law, in case of a will, and was not in abeyance) that of *Plunkett* and *Holmes* was where one seised of lands in fee devised them to his eldest son *Thomas* for life, and if his said eldest son *Thomas* should die without issue living at his death, then to the testator's other son *Leonard* and his heirs, but if *Thomas* should have issue at his death, then the fee to remain to the right heirs of the eldest son *Thomas*. The testator dies, after which the eldest son *Thomas* enters and suffers a recovery and dies without issue; and the question being whether the remainder limited to *Leonard* was destroyed, adjudged that it was, and plainly it was so, because it was a contingent remainder; but that this resolution affected not the principal case, it only proved that the recovery by *Evers Armin* barred the contingent remainders limited to the issue of *Evers Armin*, as likewise the contingent remainders limited to Sir *Thomas Barnadiston* and *Styles*.

That indeed in the above cited case it was said by some of the Judges, that the reversion descended to the testator's eldest son *Thomas*, until the contingency happened; but there was no need of making this point any part of the question before the Court, and it seemed unnecessarily and extrajudicially thrown in, for whether the fee did or did not descend to the testator's heir at law (*Thomas*), still the recovery suffered by *Thomas* the devisee for life must in either case be an equal bar to the contingent remainder to *Leonard*. [513]

But the reason of their opinion seemed to be, for that the devise of the fee in that case, was to the testator's heir at law, and where the devise is to the testator's heir at law, the fee must descend, and such heir at law will take by descent.

It was true, as to the case of *Purefoy* and *Rogers*, where *Sampson Shelton* seised of lands in fee devises them to his wife for life, that if God shall bless her with a son, and the wife shall call that son by the testator's christian and sur-

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name, then the testator gives the inheritance of this land to such son after his mother's death, and if such son should die before his age of twenty-one, then to the testator's right heirs after the death of his wife; the testator died, and his wife married again, and it was held so plain by *Hale* C. J. that he would not permit *Saunders* to argue it, that the reversion in fee in that case descended to the heir at law of the testator until the son should be born, and that when the testator's heir at law having the reversion in fee conveyed it to the testator's wife and her second husband and their heirs, and made that conveyance before the birth of the wife's son by the second marriage, it must destroy the contingent remainder: all that might be allowed to be law; but still it differed from the principal case; because in the case of *Purefoy* and *Rogers*, the devise was to the testator's right heirs, (he admitted it was said if such son as his wife should have by her second husband should die before twenty-one,) however it was a devise by the testator to his own right heirs; and in all cases where the devise is to the heir at law, the reversion
[514] descends to him; whereas in the principal case the devise was not to the testator's heir at law, no not upon any contingency.

On the contrary, where the devise was to *Evers Armin* for life, and if he had issue male, then to such issue male, in fee, and if he had no issue male, then part of the testator's estate was devised to *Barnadiston* in fee, and the other part to *Styles* in fee; it was plain, that *Evers Armin* either must or must not leave issue male, and in either case the fee was equally given from the testator's heir, under whom the plaintiff *Carter* claimed.

So that here was no reversion, contingency, or possibility that appeared to be left for the testator's heirs; he had shut the door every way against them, whether *Evers Armin* should leave issue male, or not.

That the principal case was much stronger than where the devise is to *A.* for life, remainder to the right heirs of *J. S.* because in that case *J. S.* might not die in the life of *A.* and then the testator's heir would take, and so there might be something said, why in that case the reversion should descend until the contingency one way or other falls out; but here the testator expressed his intention to give the inheritance of the premisses in all events from his heir at law, whether *Evers Armin* should leave issue male or not; and that the contingency should be only betwixt the issue male of *Evers*

Armin and the devisees over, *viz. Styles* and *Barnadiston*, and plainly designed no contingency, chance or possibility to his own heir.

Also the *Master of the Rolls* said, that where one devises lands to *A.* for life, remainder to the right heirs of *J. S.* then living, though the remainder in fee is in abeyance, yet there [515] is a possibility left in the heir, and that this was plain even in the case of a grant, 2 Roll's Abr. 418. Pl. 1. 2. and in 11 H. 6. 12 b. where a grant is made to *A.* for life, remainder to the right heirs of *B.* and *A.* dies living *B.* so that *B.* can have no heirs, the grantor shall have his lands again for want of any other person to take them.

And this possibility seemed such an interest as intitled the donor (*a*) to enter for the forfeiture made by the feoffment of tenant for life, for that his estate was as much determined as it would have been by his death; and it was absurd, that tenant for life by an unlawful act, *viz.* by destroying the contingent remainder, should gain to himself an indefeasible fee simple; or like the possibility that was upon a grant at common law to a man and the heirs of his body; for there, though the grantor had no reversion, yet he (*b*) might enter when the grantee died without issue; and that

(*a*) See this question, Littleton's Reports, 159, 160.

(*b*) 1 Inst. 19. 22.

Therefore in the principal case, when *Evers Armin* suffered a common recovery by which his estate for life determined as much as by his death, and by which the contingent remainders were destroyed, supposing the heir at law of Sir *Michael Armin* the testator might enter, it was however a disputable point and proper to be determined at law; and there being no incumbrance upon the premisses to cover the same from an ejectment, and it being a mere legal title, the court said the bill should be retained for a year, to the intent that in the mean time the plaintiff might try his title in an ejectment; also in regard the plaintiff (having purchased in the title of the heirs at law) stood in their place, and was therefore intitled to the aid of a court of equity against the defendants, and (*inter al'*) against the defendant *Coppen*, he being a purchaser [516] with notice, *viz.* with notice of Sir *Michael Armin*'s will upon this point in question; therefore in order to this trial the plaintiff was intitled to have all the deeds and writings produced.

The plaintiff *Carter* being dissatisfied with this decree, appealed to *Lord Chancellor Parker*, upon which the cause was heard before his Lordship, who at first sent it to the Master to state the matter, and after it had come on upon the report,

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(a) Mic. Term. 1720.

and had held two days' debate, his Lordship (*a*) delivered his opinion.

The reason of the law why a remainder in fee is said to be in abeyance.

As to the remainder in fee being in (1) abeyance, or in the custody of the law, or (as some call it) *in gremio legis*, his Lordship much exposed that notion, saying the most reasonable inference from it was, that it should be for the preservation of this remainder; but since the construing the fee to be in abeyance would on the contrary tend to the manifest destruction thereof, and since nothing but necessity in any case should occasion the fee-simple to be in abeyance; since the diversity taken by the † books was between a will and a common law conveyance, and that in case of a will, where the remainder was devised in contingency, it was held that the reversion in fee descended to the heir at law in the mean time, and that whatsoever estate was not disposed of by the testator, descended to the heir, (*z*) his Lordship said he should abide by that opinion, and was very clear in it.

[517] That it was a strange construction to take pains by a strain in law, to place a remainder in fee *in nubibus*, or in abeyance, on purpose that the testator's intention should be wholly frustrated, and that the tenant for life might be under a temptation to disappoint the will, by destroying the contingent remainder by a recovery or feoffment, which in this case must be admitted to be tortious conveyances; nay, what was still more extraordinary, that the tenant for life must be rewarded for this wrong, and that he who before had but an estate for life, should gain an absolute and indefeasible fee-simple, and this by doing a wrongful act, which would be to take advantage of his own wrong, both against law and reason.

That the case of *Plunket* and *Holmes* was a resolution in point, that where the remainder in fee was devised in contingency, the fee descended to the heir until the contingency happened, and though he should admit that resolution to be extrajudicial, and not directly to the point then in question,

† *Quære tamen* upon what foundation this distinction between a remainder created by a conveyance, and one arising by will depends; since there does not appear to be any such difference taken in the cases of *Plunket* and *Holmes*, and *Purefoy* and *Rogers*.

(1) Fearne's Cont. Rem. 275. & seq.

(*z*) *Hopkins* v. *Hopkins*, Ca. tem. Talb. 43. 52.

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yet the opinion of four learned Judges must be of great weight, especially against the notion which was contended for by the other side; and that the case of *Purefoy* and *Rogers* in 2 Saunders, was equally in point, and the interruption which Lord *Hale* gave to *Saunders* who attempted to argue this, did not proceed from any heat or impatience in Lord *Hale* (who was master of a great deal of temper, as well as learning) but from the result of his fixed judgment and opinion, that where after an estate for life the remainder in fee was devised upon a contingency, the fee-simple not being disposed of until the contingency happened, must in the mean time descend to the heir; and to say that in these cases of *Plunket* and *Holmes* and *Purefoy* and *Rogers*, the devise over of the fee (after the contingent devise in fee) was to the testator's right heirs, and [518] that this distinguished it from the principal case, and made the heir take by descent, was hardly agreeable to the rules of law, for when the testator had devised the remainder in fee upon so remote a contingency, having in that manner given a fee he could go no farther, nor devise any remainder over, and therefore in such case the devise over of the fee-simple would be void, whether made to the heir or to any other person.

That these devises to the issue male of *Evers Armin* in fee if there should be any issue male, or if there should be none, then that *Willoughby* should go to *Barnadiston* in fee, and *Pickworth* to *Styles* in fee, being made upon contingencies that † never happened, it was the same thing as if those devises had never been made, and consequently the reversion in fee descended to the testator's heir at law. (*z*)

One devises lands to his executors until his debts paid, the remainder over; the executors misapply the profits; they shall hold only until they might have paid the debts by the profits, and after that the land is to be discharged, and the executors only liable. Vide Salk. 153. accord. (*y*)

Also as to what has been contended for by the plaintiff's counsel, that the executors of Sir *Michael Armin* should hold over, notwithstanding they misapplied the profits and did not with them pay the debts of Sir *Michael*:

He admitted that if any were to hold over, it must be the executors of Sir *Michael*, who were the devisees of this uncertain interest, until the debts were paid; but it would be very strange to say, that because *Evers Armin* one of the executors

† *Quære?* For the contingency of *Evers Armin*'s dying without issue male actually happened.

(*z*) See note to *Purefoy* v. *Rogers*, 2 Williams's Saund. 382.

(*y*) *Hutchinson* v. *Massareene*, 2 Ba. & Be. 49.

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did not apply the rents as he ought to have done towards payment of the debts, therefore and for that reason, he that acted wrongfully should hold over. This would be directly

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to let a man take advantage of his own wrong, and was the same as to say, that the longer the executors misapplied the profits, the longer they should hold the estate, nay, they should hold it purely because they did the wrong.

That therefore this term or uncertain interest should determine at such time as the executors might have paid the debts, if they had duly applied the rents, &c. And as to the profits misapplied, the creditors must pursue the trustees for such profits, and if the uncertain interest of the trustees for the payment of the debts was become vested by survivorship in any third person, such person was barred by fine and non-claim.

As to the bar which was insisted on by the defendant with regard to the moiety of the premisses by means of the fine levied by *Bullingham* and *Barnadiston* in *Hill.* term, 1697, (for as to Lady *Bellasis*'s moiety it was allowed the fine would be no bar, Lady *Bellasis* being then a feme covert, and she having died a feme covert within five years before the commencement of the suit) it had been objected, that *partes finis nihil habuerunt*, in regard some few months before the levying the said fine, Sir *Thomas Barnadiston* who was said to be the disseisor of the premisses, did by lease and release convey the inheritance of the premisses to Sir *Samuel Barnadiston* in mortgage, and though the former had the possession of the estate, yet this was only under the proviso of the mortgage, as tenant at will to the mortgagee, until default of payment.

And it was said, that since C. J. *Holt* in delivering the resolution of the court in the case of *Hunt* (*a*) and *Bourn* had declared, that if lessee for years levied a fine without first making a feoffment, the fine would be void as to the making of any title by way of non-claim, by reason of the imbecility of his estate, and that *partes finis nihil habuerunt* (with which declaration of lord *Holt, Lord Chancellor* agreeing), it was from thence inferred, that if where lessee for years levied a fine, it might be said that the fine was void, for that *partes finis nihil habuerunt, à fortiori* it might be so said in the case of tenant at will's levying a fine: But

(*a*) Salk. 340.

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Fine levied by lessee for years or at will void; *secus* where by one having a defeasible right, and such lessee joins with him.

Lord Chancellor held that in this case it could not be said that *partes finis nihil habuerunt;* because *Armin Bullingham*

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on the death of *Evers Armin*, and as his devisee had a right against all persons whatsoever but the heir of Sir *Michael Armin* the testator, and *Barnadiston* entering upon him as a disseisor; and though *Barnadiston* afterwards mortgaged the premisses in fee, yet he continuing in possession thereof, and joining with *Bullingham* in the fine, it could not be said that *partes finis nihil habuerunt*, when one of them, *viz. Barnadiston* had the possession, and the other of them, *viz. Bullingham* had the right to the land against *Barnadiston*, and also against his mortgagee.

Also his Lordship held that the statute of limitations barred the plaintiff as to the whole; because it was found by the *Master*'s report that at the time of the common recovery suffered by *Evers Armin*, both the co-heirs of Sir *Michael Armin* were of age, and unmarried.

That upon this recovery suffered by *Evers Armin* in 1675, he being but tenant for life, and the co-heirs having the reversion in fee descended to them, they had a right of entry which then commenced, but had no new right of entry upon the death of *Evers Armin*; * and that this was not like the common case of tenant for life, with the reversion in fee to *J. S.* where, it is true, the reversioner in fee is not bound to watch after any (*a*) forfeiture, he may stay till the death of tenant for life; but here, the only title which the co-heirs could possibly have, must be by the forfeiture of *Evers Armin;* for if there was no forfeiture, then, upon *Evers Armin*'s death, the remainder must either go to the issue male of *Evers Armin*, if any, or if none, to *Barnadiston* and *Styles*, and so this case differed from that of a bare tenant for life, reversion in fee.

Where lands are devised to *A.* for life, and if *A.* shall leave issue male, then to such issue male and his heirs for ever, and if *A.* shall leave no issue male, then to *B.* in fee; if *A.* suffers a recovery of these lands, and five years pass, the right heirs of the testator are barred, in regard they ought to have entered upon such forfeiture, and have no new entry upon the death of the tenant for life. 1 Vent. 241.

(*a*) Vide 3 Rep. 79.

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Lastly, as to the contribution which the plaintiff claimed out of *Willoughby*, in respect of the mortgage debt upon *Pickworth*, this the court said was intended by the testator (Sir *Michael Armin*) for the benefit of *Styles*, and related only to the division of estate between *Styles* and *Barnadiston;* but when the will was disappointed by the recovery of *Evers Armin*, who thereby forfeited his estate for life, and barred both the contingent remainders to *Styles* and *Barnadiston*, and whereby the co-heirs of Sir *Michael Armin* became intitled to both the manors, so that they came into one hand, the right of contribution was at an end; for a man could not contribute to himself, and the right of contribution, as it was given by the will, so was it in force only while the party claimed under

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the will, and not where the demand was set up in defiance thereof.

All which points his Lordship said were to him pretty clear; however, if the parties desired that this matter should be made a case upon the Master's report, for the opinion of the Judges, it should go to the Judges of *C. B.* and that by this he did a kindness to both parties in saving them the charge of a trial at bar, and of a long special verdict, and the great length of
[522] time that this would of course take up, before they could come to have the point argued. †

† It appears from Lord *Macclesfield*'s notes, that this case was soon after compromised by the parties.

CASE 147.

ANONYMOUS.

At the Rolls. Tho' the next day after the last day of the term be not in strictness part of the term, and therefore no motion can then be made on the petty bag side; yet as to other purposes it is part of the term, for which reason, a motion made at that time to dismiss a bill for want of prosecution, on a certificate that there had been no prosecution within three terms, of which the last term was one, was denied.

A Motion was made the day after the term at the Rolls to dismiss a bill for want of prosecution, on a certificate from the six clerk, that there had been no prosecution within three terms, of which the last term was one.

And it was objected that this motion came too soon; because this next day after the end of the term was taken to be as part of the term, and notices given of motions the last day of the term were good to move at the Rolls the day after; to which Sir *Joseph Jekyll* the *Master of the Rolls* agreed, and denied the motion.

But Mr. *Vernon* said the day after the term could not be taken to be part of the term, neither could there be any motion made on the petty-bag side on that day, and the allowing of motions to be made the day after the term on notice to move the last day of term was only for conveniency of business, in regard there might not be otherwise time to hear all the motions; and it was said by some of the bar, that such motions had been usually granted for dismissing of bills on the
[*523] day after the term.

So where the last seal continued three days, and computing the third day according to the day of the month, the time would be expired for making a report absolute; yet this not so, it being only a continuance of the first day.

Agreeable to the above mentioned order in *Hill. vacation* 1721, when the last seal lasted three mornings, * and computing the third morning according to the day of the month, it

would be a proper time to move to make a report absolute, (*viz.*) it would then be above eight days after service;

CARTER *v.* BARNADISTON.

By *Master of the Rolls*, the report cannot as yet be made absolute; for though this seal lasts three days, yet is it all only a continuance of the first day, and so the time not yet out. †

† The like determination by Lord Chancellor *King*, in 1730. (*z*)

(*z*) See *Sharp* v. *Ashton*, 2 V. & B. 412. *Rowe* v. *Jarrold*, 5 Mad. 45.

ANONYMOUS.

CASE 148.

LORD CHANCELLOR PARKER. *A.* being beyond sea, sues *B.* at law; *B.* brings a bill in equity against *A.*: Court will order that service on the defendant's attorney at law shall be good service, (*z*) but not that such attorney shall put in an answer without oath. Qu. if the defendant was in an enemy's country, where no commission could go to take the answer. (*y*)

J. *S.* who was his Majesty's resident at *Tunis*, commenced a suit against *J. N.* at law, and *J. N.* having brought a bill in equity against *J. S.* obtained an order to serve the attorney at law of the defendant in equity, and that such service should be good. And now the defendant in equity moved that his attorney should answer for him, and that such answer might be taken without oath, forasmuch as no commission could be sent to *Tunis*, and it was the same as if the defendant in equity lived in an enemy's country.

Cur': The plaintiff is entitled to a discovery, and an answer without oath is nothing; besides the *English* have a consul at *Tunis*, and commissions have gone there by way of *Leghorn*; wherefore deny the motion.

If there had been a general letter of attorney to one to appear in and defend suits, the court would have ordered such attorney to appear for the principal, and that service on him should have been good service.

(*z*) See *Hales* v. *Sutton*, 1 Dick. 26. *Carter* v. *De Brune*, ib. 39. *Hyde* v. *Forster*, ib. 102. *Brown* v. *Lee*, 2 Dick. 545. *Lee* v. *Warner*, ib. 546. *Anderson* v. *Lewis*, ib. 776. *Stephen* v. *Cini*, 4 Ves. 359. *Anderson* v. *Darcy*, 18 Ves. 447. *Smith* v. *Hibernian Mine Company*, 1 Sch. & L. 238.

(*y*) See —— v. *Romney*, Amb. 62. *Cahill* v. *Shepherd*, 12 Ves. 335.

CASE 149.

DE TERM. S. HILLARII, 1718.

VINCENT *versus* FARNANDEZ.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 513. pl. 2. In the court's allowance of a maintenance out of a Jew's estate, to his daughter turned protestant, not material though the daughter be above forty years of age, or married, or tho' the Jew be dead.

A *Jew* had a daughter who turned protestant, the *Jew* had a very considerable personal estate, and dying in *May* last, after having by his will left several charities, and given his personal estate from his daughter to his executor, the daughter who was married and forty-four years old petitioned Lord Chancellor for a maintenance upon the statute of the first of Queen Anne, cap. 30. intitled an act to oblige the *Jews* to maintain and provide for their protestant children, whereby it is enacted, " that if any *Jewish* parent, in order " to compel his protestant child to change his or her religion, " shall *refuse* to allow such protestant child fitting mainte- " nance suitable to the degree or ability of the parent, and " to the age and education of such child, upon complaint to " the Lord Chancellor or Lord Keeper, &c. it shall be lawful " for the Lord Chancellor, &c. to make such order for the " maintenance of such protestant child, as he or they shall " think fit."

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And it was objected that this case was not within the act, for that,

First, This child is above forty years old, and so the care of her education over.

Secondly, She is married, and not now to be called a *child,* but to be provided for by her husband.

Thirdly, That the parent being dead could not be said to have *refused,* &c. and so the power given by the act at an end.

Lord Chancellor : I strongly incline to think this case within the act upon the following reasons; the petitioner is a protestant child of a *Jewish* parent, tho' the parent be dead. Suppose the child of a *Jew* turns protestant, and the *Jew* the parent by will gives his estate to trustees, upon a secret trust, that if the child turn *Jew* the child shall have the estate, and not otherwise. As this would be clearly within the mischief, so every one must wish it to be within the meaning of the act. It is not said the complaint shall be against the *father*; that would indeed take this case out of the act; neither is it said

that the order should be made upon or against the *father*, so that this case fits every word made use of by the legislature.

Suppose a suit or petition had been exhibited, and the *Jew* the parent had died pending the petition, and had given all away from his protestant child because the child had turned protestant, doubtless the complaint might be against the *executor*, and the order likewise against the *executor;* every one will allow this to be a hard case, and if the words be large enough (as they are) why should they not be construed to extend to it?

Then as to the *refusal* of the parent, it is not to be intended [526] that the parent the *Jew* must make an actual refusal *in words*, for by that construction the statute might easily be evaded, and rendered useless. If the *Jewish* father does by will dispose of all his estate from his child, this is in law a refusal; and unless some other reason be made appear, it shall be intended, because the child was a protestant.

The obligations of nature plead so strongly on behalf of a child, that when such a case happens, some great provocation must be supposed to have occasioned it, and if no other reason be made appear, this difference in religion shall be intended the reason.

Possibly these charities given by the *Jew*'s will may be under some secret trust for the child if she should turn *Jew*, wherefore let all this be inquired into by the Master.†

† Though this was the opinion of the Court, it does not appear that on this petition the Court made any order; and as nothing further is to be traced in this matter, it is probable the parties came to some agreement.

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L'FIT *versus* L'BATT. (1)

CASE 150.

THERE was a *French* will the original whereof was proved in *French*, and under it in the same probate the will was translated into *English*, but it appeared to be *falsely* translated.

At the Rolls. 2 Eq. Ca. Ab. 777. pl. 1. A will is made in French, and the probate is in English, and varies from the original; probate being in a different language is not conclusive.

(1) Reg. Lib. B. 1718. fol. 172.

L'FIT v. L'BATT.

Upon which it was objected, that the translation being part of the probate, and allowed in the spiritual court, it must bind; and the application must be to the spiritual court to correct the mistakes in the translation, which until then must be conclusive.

But by the *Master of the Rolls*, nothing but the original is part of the probate, neither hath the spiritual court power to make any translation; and supposing the original will was in *Latin* (as was formerly very usual) and there should happen to be a plain mistake in the translation of the *Latin* into *English*, surely the court might determine according to what the translation ought to be. And so it was done in this case.

CASE 151.

BISHOP OF LONDON *versus* WEB.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 758. pl. 4. Lessee for years sans waste, remainder in fee to a bishop, lessee enjoined from digging the ground for brick.

BISHOP *Bonner*, in the time of Edw. the 6th, being then Bishop of *London*, made a long lease of some lands in *Ealing* in *Middlesex*, in which there are about twenty years yet to come, and the lease was made *without impeachment of waste*, and the defendant *Web*, in whom by several mesne assignments the remainder of this lease was vested, articled with some brick-makers, that they might dig and carry away the soil of twenty acres six foot deep, part of the premisses, provided they did not dig above two acres in the year, and levelled those acres before they dug up others.

The Bishop of *London*, having the inheritance of the premisses in right of his Bishoprick, brought a bill to enjoin the digging of brick in this manor, alledging that this was carrying away the soil, part of the inheritance, and would in consequence turn the pasture field into a pit or pond; that it was like the case of *Vane* v. Lord *Barnard* (*a*) where Lord *Barnard* having upon his marriage settled *Raby* castle (the family seat) upon himself for life without waste, remainder to his first, &c. son of that marriage, afterwards, upon some displeasure taken against his son, employed several persons to pull down the castle, upon which the court granted a perpetual injunction to stop him, and ordered him to amend and repair what he had pulled down; for that he should not destroy the thing itself, which he had expressly settled. So in this case, the defendant, in digging all the soil for bricks, was actually destroying the field.

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(*a*) 2 Vern. 738. Salk. 161. One in consideration of marriage settles a house to the use of himself for life, sans waste, remainder to his son, &c. The tenant for life shall not pull down the house. Lessee for years sans waste, cannot pull down a house, or the trees that are a defence or ornament to the house. Lessee for years sans waste may open mines.

But for the defendant it was said, that frequent experience shewed, that the digging of brick did not destroy the field, there being many fields about the town where brick had been dug, and those fields now used again for pasture; but admitting it was waste, yet there being a power to commit waste, the lessee might do it, as well as open a new mine, and carry away the mineral, without filling it up again.

On the other side it was replied, that the privilege of being *sans* waste would not in equity entitle one to pull down an house, or even cut down trees that are for the ornament of the house. (1)

Lord Chancellor: Before the statute of *Gloucester*, waste did lie against (*a*) lessee for years, and the being without impeachment of waste seems originally intended only to mean, that the party should not be punishable by that statute, and not to give a property in the trees or materials of an house pulled down by lessee for years *sans* waste; but the resolutions having established the law to be otherwise, I will not shake it, much less carry it further.

(*a*) 1 Inst. 54. Hard that lessee for years sans waste should enjoy the trees or materials of the house when he pulls them down, the intention only being that the lessee for years should be as free from waste as he was before the statute of Gloucester.

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But I take this to be within the reason of Lord *Barnard*'s case, where, as he was not permitted to destroy the castle to the prejudice of the remainder-man, so neither shall the lessee in the present case destroy this field against the Bishop who has the reversion in fee, to the ruin of the inheritance of the church. (*y*)

Let the defendant carry off the brick he has dug, but take an injunction to stop further digging.

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(1) Vide *Packington*'s case, 3 Atk. 215. *Aston* v. *Aston*, 1 Vez. 264. *Chamberlain* v. *Dummer*, 1 Bro. C. C. 166. (*z*)

(*z*) 3 Bro. C. C. 549. The Court will restrain tenant for life without impeachment of waste from cutting timber growing for shelter or ornament, *Strathmore* v. *Bowes*, 2 Bro. C. C. 88. *Tamworth* v. *Ferrers*, 6 Ves. 419. *Williams* v. *M'Namara*, 8 Ves. 70.; tho' growing on a common at a distance from the house, and tho' the property of strangers intervene, *Downshire* v. *Sandys*, 6 Ves. 107. So timber planted to exclude objects from view, *Day* v. *Merry*, 16 Ves. 375.; and timber which the settlor considered ornamental, will be so viewed by the court, *Downshire* v. *Sandys*, ub. sup. And see *Williams* v. *Williams*, 15 Ves. 419. 12 East, 209. *Burges* v. *Lamb*, 16 Ves. 174. *Attorney General* v. *Marlboro'*, 3 Mad. 498.

(*y*) *Bishop of Winton's case*, cited in *Abrahall* v. *Bubb*, 2 Freem. 55. 2 Swan. 172. and in *Skelton* v. *Skelton*, 2 Swan. 171. note.

CASE 152.

METHAM *versus* DUKE OF DEVON.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 291. pl. 13. 331. pl. 5.

THE late Earl of *Devonshire* devised three thousand pounds *to all the natural children of his son the late Duke of* Devonshire *by Mrs.* Heneage; and the question was, whether the natural children by Mrs. *Heneage* born after the will should take a share of the three thousand pounds?

One devises 3000*l.* to all the natural children of his son by Jane Stile, the bastards born after making the will shall not take; nay the child in ventre sa mere shall not take. (*z*)

3 Ch. Ca. D. 735.

Lord Chancellor: They shall not; the Earl of *Devonshire* could never intend that his son should go on in this course, that would be to encourage it; whereas it was enough to pardon what was passed; besides bastards cannot take (*a*) until they have gained a name by reputation, for which reason, though I give to the issue of *J. S.* legitimate or illegitimate, yet a bastard shall not take.

(*a*) 1 Inst. 3. b.

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But then it was said, the directions of the will were, for the executors to pay this 3000*l.* as the Earl the testator should by *deed* appoint, and the Earl afterwards by deed appointed the 3000*l. to all the children of his son* (the duke) by Mrs. *Heneage*, so that this now depended upon the *deed*, and therefore must refer to the children born at the time of the execution thereof.

And though in the principal case the money was to be paid by the executors, as the testator by deed should appoint; and the testator afterwards made the deed of appointment; the deed of appointment referring to the will was held as part of the will. (*y*)

(*z*) A bequest to a future natural child is void, *Arnold* v. *Preston*, 18 Ves. 288. *Wilkinson* v. *Adam*, 1 V. & B. 422. So to the child of which an unmarried woman is ensient, when with reference to a particular man as the father, from the impossibility of ascertaining whether it is, or is not, the child of the man referred to, *Earle* v. *Wilson*, 17 Ves. 528. *Secus*, to the child of which she is ensient generally, for there is then no uncertainty, *Gordon* v. *Gordon*, 1 Mer. 141. Under a bequest to children as a class, legitimate children alone can take, unless it appear on the face of the will that illegitimate children were intended, *Cartwright* v. *Vawdry*, 5 Ves. 530. *Godfrey* v. *Davis*, 6 Ves. 43. *Wilkinson* v. *Adam*, ub. sup. *Swaine* v. *Kennerley*, 1 V. & B. 469. *Kenebel* v. *Scrafton*, 2 East, 530.; (and see *Vanderzee* v. *Acklom*, 4 Ves. 771. *Hercy* v. *Birch*, 9 Ves. 357.) or the bequest be to children in existence at the date of the will, as, "to my present children," and the testator had no legitimate children to satisfy the bequest, *Beachcroft* v. *Beachcroft*, 1 Mad. 430. *Woodhouselee* v. *Dalrymple*, 2 Mer. 419. And see *Bayley* v. *Snelham*, 1 S. & S. 78.

(*y*) An instrument though in form of a deed, will be construed as testamentary, when it can only take effect after the maker's death, and cannot operate as a deed, *Rigden* v. *Vallier*, 2 Vez. 258. *Habergham* v. *Vincent*, 4 Bro. C. C. 353. 2 Ves. jun. 204. And see *Healy* v. *Copley*, 7 Toml. P. C. 496.

METHAM v. DUKE OF DEVONSHIRE.

Tamen per Cur': The deed (1) referring to the will is as to this purpose, to be taken as part thereof.

Also it being a question, whether a natural child *in ventre sa mere*, of the Duke of *Devonshire* by Mrs. *Heneage* should take?

Lord Parker inclined that such child could not take for the reason abovementioned, *viz.* for that a bastard could not take, until he had got a reputation of being such a one's child; and that reputation could not be gained before the child was born.

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(1) Reg. Lib. B. 1718. fol. 215. "His "lordship conceived the said deed poll "to be part of the will of the said late "earl of *Devon*, in the nature of a co- "dicil thereunto, explanatory of the "will, and that the money thereby di- "rected to be paid was a provision for "such children or reputed children of "the said duke by Mrs. *Heneage*, as "were living at the time of the date of "the said deed poll, but not for such "children as he afterwards had by her."

BABINGTON *versus* GREENWOOD.

CASE 153.

LORD CHANCELLOR PARKER.

Pre. Cha. 505. 2 Eq. Ca. Ab. 721. pl. 5. Jointure by a freeman on his wife in bar of dower, will not bar the wife's customary part; *secus* if said to be in bar of her customary part.

A Freeman of *London* on his marriage covenanted to add 1500*l.* out of his own personal estate to 1500*l.* which was the portion of his then intended wife, and both these sums were to be laid out in a purchase of land and to be settled upon the husband for life, and then to the wife for her life for her jointure, and *in bar of her dower*, with remainder to the children of the marriage.

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The freeman makes his will, and thereby (among other things) gives a legacy to his wife, and dies leaving a wife and children.

Upon a demand made by the wife of her customary part, it was objected by Mr. *Mead*, that though a jointure *of land* made by a freeman on his wife in bar of dower, should not bar the wife's customary part, any more than it would bar her of her share by the statute of distribution, (as in the case of (1) *Atkins* v. *Waterson*, where the Court of Aldermen by the Recorder certified they had no custom extending to that case;) yet where the jointure was to be made out of the free-

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(1) 1 Eq. Ca. Abr. 157. pl. 5.

BABINGTON v. GREENWOOD.

man's *personal estate*, and consequently to lessen the customary part, such a jointure said to be in bar of dower should be intended *a full provision* and to be in bar of *any other provision*, consequently in bar of her customary part; at least, that there being a legacy given by this will to the wife, she should not have both the legacy and the customary part; but must abide entirely by the will, or by the custom, and that it had been carried so far by the late Master of the Rolls, as that where a freeman of *London* devised a real estate to his wife, he decreed that even this would bar the wife of her customary part, and that she should not take both.

But *Lord Chancellor* held clearly, that a jointure of land made by a freeman of *London* upon his wife, if expressed to be in bar of her customary part by the custom of *London*, then it would be so; but if it were not so expressed, and only said to be in bar of her *dower*, this would be no (1) bar of the wife's customary part; because land, or a real estate is of a quite different nature from personal estate, and a matter wholly (*a*) out of the custom of *London;* and as it had been admitted, that a jointure of *land* settled in bar of dower would no more bar the widow of her customary part than it would exclude her from her share by the statute of distribution, in case her husband should die intestate, his Lordship said, it was the same thing in the principal case, where a freeman had covenanted to lay out of his own estate 1500*l.* in a purchase and to settle it on himself for life, remainder on his wife for life for her jointure; with remainder to his children.

(*a*) Post. Blunden v. Barker. 647.

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1*st*, Because from that time the 1500*l.* was not his own estate, nor what the custom of *London* could meddle with; for a man's own estate is what he has beyond his debts, and what he owes is *æs alienum*, and the custom of *London* affects only what is beyond his debts.

Land, or money covenanted to be laid out in land, not within the custom of London.

2*dly*, For that money covenanted to be laid out in land is, as to all respects, land in equity, and would descend as land for the benefit of the heir, and not go to the executor; it might be intailed as land, and had the other qualities of land, and consequently was not within the custom of *London*.

Neither was this to be looked upon as breaking into the custom; for the freeman might at any time during his life, even in his last sickness, have invested his personal estate in the purchase of land, which would defeat the custom and

(1) So lands settled on a child shall not be brought into hotchpot under the custom. *Hume* v. *Edwards*, 3 Atk. 453.

stand (*a*) good, though the freeman should at the same time have said, that he did this on purpose to defeat the custom. And as this (if the purchase was real) would have held good to bar the custom, surely the case could not be worse, where such agreement for making the purchase was for a valuable consideration, and part of the marriage articles.

(*a*) Post. Frederick v. Frederick, 719.

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Then as to the legacy given to the wife by the freeman's will, it appearing that this legacy, together with all the other legacies (for so it must be intended) did not † exceed the husband's testamentary part, it was (he said) the same thing, as if these legacies had been given by the freeman expressly out of his (1) testamentary part, which he had full power to dispose of by his will; and therefore this legacy being no ways inconsistent with the custom, the wife might in such case take both; for it was only the inconsistency betwixt the legacy and the custom that prevented the widow or child in any case from taking both; the consequence of which was, that if the freeman gave any legacy out of his testamentary part, the wife or child might (provided there was sufficient) take both by the will and by the custom, and therefore so might the wife do here.

Where a freeman leaves his widow a legacy, and there is sufficient out of his testamentary part to pay the same, she shall have her legacy and customary part also.

When indeed the freeman's testamentary part would not pay all his legacies, there the wife, if she were a legatee, should not take her legacy and her customary part also. (2)

In the last place his Lordship said, it could never be maintained, that a devise of a real estate by a freeman to his wife should bar her of her customary part or prevent her from taking both, unless it were so expressed in the devise; and that for this plain reason, because the devise of the real estate to the wife no ways lessened or prejudiced the customary part, nor was it any ways material to those who were interested in the customary or orphanage part, where the real estate went; so that there could be no colour or foundation for such a precedent, as Mr. *Mead* had cited from the Rolls,

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In all which points the Court was extremely clear.

† *Quære autem* whether such legacy must not be given out of the testamentary part, as appears from the reporter's notes to have been determined in the case of *Biddle* v. *Biddle*, about this time. See also the case of *Frederick* v. *Frederick*, post. 722.

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(1) Contra, *Car* v. *Car*, 2 Atk. 278.
(2) Vide *Cowper* v. *Scott*, post. Vol. III. 123.

CASE 154. HUGHES *versus* SAYER.

At the Rolls. One having two nephews, *A.* and *B.* devises his personal estate to *A.* and *B.* and if either die without children, then to the survivor; this is good.

JOHN Hughes, after several legacies, by his will directed that the surplus of his personal estate should be divided by his executors into ten shares, three shares whereof should be paid to his nephew and niece, *Paul* and *Anne Hughes* children of a deceased brother, *and upon either of their dying without children, then to the survivor*, and if both should die without children, then to the children of the testator's other brothers and sisters.

4. Russ. Myl. 405. 2. Myl & Lee 444. 4. Bear. 422. 1. Young & C. 497.

The question was, whether this devise over of a personal estate upon the devisee's dying without children, was good or not?

And his Honour, having taken time to consider it, gave judgment that the word [children] when unborn, had been in case of a will construed to be synonymous with *issue*, and therefore would in a will, create an estate (*a*) tail; and if the word [children] was understood to be the same with *issue* in the present case, then the devise over of the personal estate upon a death without issue would be void; but that here the words [dying without children] must be taken to be *children living at the death of the party*. For that it could not be taken in the other sense (that is) whenever there should be a failure of issue, because the immediate limitation over was to the (1) *surviving devisee*, and it was not probable, that if either of the devisees should die leaving issue, the survivor should live so long as to see a failure of issue, which in notion of law was such a limitation as might endure for ever.

(*a*) 6 Co. 17. Wild's case.

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And therefore, by reason of the limitation over in case of either of the devisees dying without children, then to the survivor, the testator must be intended to mean a dying without children living at the death of the parent, consequently the devise over good.

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(1) So *Nicholls* v. *Hooper*, ante 199. *Fowler*, 6 Bro. P. C. 309. *Doe* v. *Lyde*, *Forth* v. *Chapman*, post. 665. *Keily* v. 1 T. R. 593. (*z*)

(*z*) See *Bell* v. *Phyn*, 7 Ves. 453. *Massey* v. *Hudson*, 2 Mer. 130.

2 Rus. & Myl. 658.

ANONYMOUS.

CASE 155.

MR. *Hale* moved for a sequestration *nisi*, for want of an answer, against a menial servant of a peer of the realm, as the first process for contempt, in the same manner as in the case of the peer himself; and though the motion was granted by the Master of the Rolls, yet the Register refused to draw it up, as thinking it against the course of the Court.

Vide Vol. II. 385. Lord Clifford's case. First process of contempt against a menial servant of a peer of the realm is a sequestration nisi.

Upon which Mr. *Hale* moved it again before the Lord Chancellor, who upon reading the statute (*a*) granted the motion likewise, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servants were to be a subpœna. (*z*)

(*a*) 12 W. 3. cap. 3.

(*z*) By stat. 10 Geo. 3. c. 50. menial servants of peers are placed on the same footing as other persons.

DE TERM. S. TRINITATIS, 1719. [536]

WINNINGTON *versus* FOLEY.

CASE 156.

UPON the marriage of the plaintiff Mr. *Winnington*, who was eldest son of Sir *Francis Winnington*, the family estate was settled upon the plaintiff for ninety-nine years if he should so long live, remainder to trustees during his life, remainder to the first, &c. son of that marriage in tail male successively, remainder to the first, &c. son of any other marriage, remainder over.

LORD CHANCELLOR PARKER. 2 Eq. Ca. Ab. 749. pl. 1. In a marriage settlement husband made tenant for ninety-nine years, if he so long lived, remainder to trustees during the life of the husband, &c. remainder to the first, &c. son by the marriage in tail male, remainder to the first, &c. son of any other wife, remainder over.

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A son is born and of age, the wife dead, and there are no other sons by second marriage; the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery.

Mr. *Winnington* had by his lady (who was dead) one son, who was come of age, and was in treaty for a marriage with one of the daughters and co-heiresses of the Lady *Read* of *Hertfordshire*, and the surviving trustee for preserving contingent remainders being dead, leaving an infant heir, the father and * son brought a bill against the infant heir that he might join in making a tenant to the *præcipe*, in order to a common recovery for making a settlement upon the son's marriage.

[*537]

On the hearing the Lord Chancellor declared, that the trustee being appointed to preserve contingent remainders, and here being a vested remainder in tail, if this were for the good of the family, he did not see but such trustee might lawfully join.

But his Lordship referred it to the Master to state whether this was for the good of the family.

The Master reported that the son was in treaty for the marriage abovementioned; that it was a beneficial marriage for the family, and that it was necessary a new settlement should be made of the estate, which could not be done without a recovery.

And now coming on upon the Master's report, Mr. *Vernon* cited Sir *Thomas Tipping*'s case (*a*) where the father was tenant for ninety-nine years if he should so long live, remainder to trustees during the life of the father, remainder to the first son, &c. There was no issue of the marriage, and the trustees joined with the father in destroying the contingent remainders, which was held to be no breach of trust.

(*a*) Stated ante, in the case of Basset v. Clapham, 359.

Where a remainder in tail is vested, subsequent contingent remainders are not regarded.

Also he said there was a later case, where the trustee, *against the consent of the father*, joined with the first son the remainderman in tail in suffering a common recovery, and yet held to be no breach of trust; for when such remainder was vested in one of full age, a subsequent remainder was not to be regarded; neither was it assets in law or equity.

[538]

Lord Chancellor: It might be greatly mischievous to a family, if such a trustee should stand out and not join with the father and son, in cutting off the old settlement and making a new one; this is plainly for the benefit of the family, for by the now intended settlement the son is to be but tenant for life, instead of tenant in tail; so that it is a means of preserving the estate longer in the family: also the wife of Mr. *Winnington* the father being dead, there is an end of the contingent remainders by that marriage; and as to any remainders by another marriage; no remainder not *in esse* ought to be so much

regarded as this remainder in tail, which is actually vested in Mr. *Winnington* the son.

Therefore let the trustee join with the father and son, in order to the barring this, and making a new settlement, and let the Master direct a proper conveyance, in which the trustee shall join. (1)

Then it was insisted, that the heir of the trustee (though an infant) was yet a trustee within the act (*a*) which enables infant trustees to convey by direction of a court of equity; and therefore it was prayed that the infant trustee might levy a fine, which must be good unless reversed during his infancy.

(*a*) 7 Annæ, cap. 19. (*y*)

Sed per Cur': I do not know how I can direct the judges or commissioners to take a fine from an infant (*x*), but let the Master direct a proper conveyance. †

† See this resolution affirmed by Lord Chancellor *King*, in *Townsend* v. *Lawton*, Vol. II, 380.

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(1) Vide *Basset* v. *Clapham*, ante 359. *Mansell* v. *Mansell*, post. Vol. II. 678. (*z*)

(*z*) *Moody* v. *Walters*, 16 Ves. 283. *Biscoe* v. *Perkins*, 1 V. & B. 485. and see *Brown* v. *Carter*, 5 Ves. 862.

(*y*) See *Ex parte Vernon*, post. Vol. 2, 549, *Goodwyn* v. *Lister*, post. Vol. III. 387. Stat. 6 Geo. 4. c. 74.

(*x*) The act being general that trustees under age shall convey, without specifying the mode of conveyance, an infant trustee may be ordered to levy a fine, *Ex parte Maire*, 3 Atk. 479.; or suffer a recovery, *Ex parte Johnson*, ib. 559. *Ex parte Smith*, Amb. 624.

[539]

HINTON *versus* PINKE.

CASE 157.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 555. pl. 16. Legacy of 1500*l.* to be laid out in land shall be taken as land, but if a deficiency of assets, then not specific, but shall contribute in proportion. Specific legacy is what vests by assent of executor.

MRS. *Jane Pinke* by her will bequeathed several pecuniary legacies, and (*int' al'*) gave 1500*l.* to her eldest son in trust to lay it out in a purchase of lands in fee, and to grant a rent-charge of 50*l.* *per annum* thereout to his daughter the plaintiff *Mary* the wife of the plaintiff *Hinton* for her separate use. But

That if her said eldest son should refuse, or neglect to lay out 1500*l.* in a purchase and grant this rent-charge, then he to have but 500*l* of the money; and the remaining 1000*l.* to

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be laid out in the purchase of an annuity, as far as it would go, for the separate use of the daughter.

There being in this case a deficiency of assets, the question was, whether the 1500*l.* legacy, or at least the 50*l.* a year annuity, should abate in proportion ?

Objected it should not; because it was ordered to be laid out in land, and so consequently to be taken as a devise of land, by which means it was become a specific devise, as had been decreed by Lord *Cowper* in the case of *Burridge* v. *Bradyl* (*a*), and as it was land, it was of a different nature, for it would descend to the heir, *&c.*

(*a*) Vide ante, 127.

Mr. *Vernon, cont' :* The legacy is money; and if money be devised to put one out an apprentice, or an annual payment be devised out of a personal estate, these, on a deficiency, shall abate in proportion with the other legacies.

[540] *Lord Chancellor :* I agree this 1500*l.* legacy shall be taken as land, but what the legacy is, or how much is to be laid out in land, is the question.

The legatee of the 1500*l.* cannot say he has a right to the 1500*l.* in specie; indeed if the money *in such a hand* were devised, this would be a specific legacy: A specific legacy is where by the assent of the executor the property of the legacy would vest.

Specific legacy, as it has in some respects the advantage, so in other respects it has the disadvantage of a pecuniary legacy.

As there is a benefit one way to a specific legatee, I mean, that he shall not contribute; so there is a hazard the other way; for instance, if such specific legacy (being a lease) be evicted, or (being goods) be lost or burnt, or (being a debt) be lost by the insolvency of the debtor, in all these cases such specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them. (1)

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(1) These consequences attending a specific legacy have raised in the several cases to be met with in the books the question, whether a legacy was *specific* or *general?* A specific legacy (strictly speaking) is said by Lord *Hardwicke*, in *Purse* v. *Snaplin*, 1 Atk. 417. to be a bequest of a particular chattel, *specifically* described and *distinguished* from all other things of the same kind, or (in other words) an *individual* legacy. So *Ellis* v. *Walker*, Amb. 310. Money, therefore, if sufficiently *distinguished*, may be the subject of a specific bequest, as, money in a *certain chest*, *&c.* *Lawson* v. *Stitch*, 1 Atk. 508. *Bronsdon* v. *Winter*, Amb. 57. or a particular debt, *Ellis* v. *Walker*, ub. sup. *Ashburner* v. *Macguire*, 2 Bro. C. C. 108. (as to the ademption of which by payment in the testator's lifetime, vide Earl of *Thomond* v. Earl of *Suffolk*, ante, 461.) So of stock, as in *Ashton* v. *Ashton*, Ca. temp. Talb. 152. (*z*) *Avelyn* v. *Ward*, 1 Vez.

(*z*) S. C. Post. Vol. III. 384.

Is it possible, supposing there were in the present case 1500*l.* of the testator's money laid upon the table, that the plaintiff the legatee should say, *I have a right to this very money in specie?* If not, then it is no specific legacy.

But the will saying that in case of the son's refusing or neglecting to make this purchase, then he is to have but 500*l.* of the 1500*l.* legacy, and the daughter to have the remaining 1000*l.*; therefore I take the daughter to be a legatee for 1000*l.* which is to abate in proportion, and as far as it will go, to be laid out in an annuity for the plaintiff the daughter for her life and for her separate use.

And *Lord Chancellor* said, that though he could not (1) come into the resolution of Lord *Cowper* in the case of *Burridge* v. *Bradyl*, yet if it were insisted on, he had such a regard for the precedent as cited, that he would see the decretal order, but this not being insisted upon by the client, it was decreed *ut supra*. [541]

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424. *Drinkwater* v. *Falconer*, 2 Vez. 623. So a bequest of a *part* of a specific chattel may be equally a specific legacy, 3 Atk. 103. but the legatees of specific parts, though not liable to abatement with *general* legatees, yet must abate proportionably amongst themselves upon deficiency of the specific thing bequeathed, *Sleech* v. *Thorington*, 2 Vez. 563. or on deficiency of the general assets for payment of debts, *Long* v. *Short*, ante, 403. So specific legatees of distinct chattels shall abate proportionally on deficiency of general assets, Duke of *Devon* v. *Atkins*, post. Vol. II. 382. On the other hand, a mere bequest of *quantity*, whether of money or any other chattel, is a general legacy, as of a quantity of stock, *Purse* v. *Snaplin*, *Sleech* v. *Thorington*, *Bronsdon* v. *Winter*, ub. sup. *Bishop of Peterborough* v. *Mortlock*, 1 Bro. C. C. 565. and where the testator has not such stock at his death, it is a direction to the executor to procure so much stock for the legatee, *Partridge* v. *Partridge*, Ca. temp. Talb. 227. *Bronsdon* v. *Winter*, ub. sup. So the purpose to which a *general* legacy is to be applied will not alter its nature, as in the above case of *Hinton* v. *Pinke*. Personal annuities given by will are general legacies, *Hume* v. *Edwards*, 3 Atk. 693. *Lewin* v. *Lewin*, 2 Vez. 417. (though this seems to have been doubted in *Peacock* v. *Monk*, 1 Vez. 133.) Whether a legacy of money to be paid out of a certain fund, shall be adeemed by the failure of the fund, vide *Saville* v. *Blacket*, post. 778. (*z*)

(1) Vide *Blower* v. *Morret*, 2 Vez. 422.

(*z*) See farther on the subject of specific legacies *Land* v. *Devaynes*, 4 Bro. C. C. 537. 2 Fonb. Eq. part 1. c. 2. s. 5. *Gillaume* v. *Adderley*, 15 Ves. 384. and cases there cited, *Apreece* v. *Apreece*, 1 V. & B. 364. *Graves* v. *Hughes*, 4 Mad. 381. *Hill* v. *Mason*, 2 J. & W. 248.

CASE 158.

LITTON *versus* LITTON.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 530. pl. 8. Interest for the arrears of an annuity, from what time.

LITTON Litton married *Bridget Mostyn*, with whom he had no portion, but an expectation of a real estate, her father *Mostyn* having a real estate and but two daughters.

Litton Litton having no issue by her, by his will devised 500*l.* a year to his said wife for her life, issuing *out of all his estate*, and subject to that annuity gave his real estate to the plaintiff *Robinson Litton*, made his wife *Bridget* executrix and residuary legatee, and soon after died.

1. Vern. 257.

The plaintiff *Robinson* being devisee of the real estate which was a very large one, upon the representation (as was said) of the widow's father, that the personal estate was very considerable, entered into articles with the defendant *Bridget*, that on her renouncing the executorship, and delivering over the personal estate to the plaintiff *Robinson Litton*, he in consideration thereof would indemnify the defendant *Bridget Litton* from all the debts of the testator, and pay her an additional annuity of 40*l.* *per annum*; the 540*l.* a year was to be paid free from taxes half-yearly; and by these articles the defendant *Bridget* agreed to accept of a security for the 540*l.* a-year out of *part of the estate only*.

[542] The plaintiff *Litton* brought a bill to be relieved against these articles, as gained upon a misrepresentation of the value of the testator's personal estate, which in reality proved to be 4000*l.* less than the testator's debts amounted unto, and the widow brought her cross bill for a performance of the articles.

But upon the hearing of this cause, it appearing that there was no false inventory or particular made of the testator's personal estate by the defendant *Bridget*, nor any estimate given in of it, whereby the plaintiff *Robinson Litton* might be induced upon the account of the value of the personal estate to come into these articles, and there being another motive to the plaintiff *Robinson* to enter into the said articles, (*viz.*) the defendant the widow's accepting the rent-charge of 540*l.* a-year out *of part only of the estate*:

Lord Cowper dismissed the original bill with costs, but as to the widow's bill ordered a performance of the articles, reserving the consideration of interest. (1)

(1) Reg. Lib. B. 1717. fol. 205.

LITTON v. LITTON.

The Master reported 820*l.* due for the arrears of the annuity, and thereupon Lord *Cowper* decreed interest for the arrears of the annuity of 540*l.* a year *from the very day of payment*, and this interest amounting unto about 80*l.* *Robinson Litton* appealed to Lord Chancellor *Parker*.

And it was argued that this was a voluntary gift of an annuity by will, not as a jointure before marriage, nor as a purchase, neither was there any clause of entry or *nomine pœnæ* to intitle the annuitant to interest; that it could not be intended the annuitant was to be paid at the very day, but some time was to be allowed; and if the annuity were paid one half-year under another, it was sufficient; for the annuity [543] was granted to issue out of the land, and as the rent of the land must be admitted to be well paid if paid one half-year under another, so ought the annuity issuing out of these lands. That if an action of debt were brought for this annuity, or a distress made for it, the plaintiff in such case would not at law have recovered interest; and why should she recover it in equity; especially when the now plaintiff offered to pay the interest from the end of half a year after the annuity became due?

That according to the rule of the court, in the case of an annuity, though granted for a jointure, the interest should be computed only from the day when the subsequent payment after the arrear incurred became due.

On the other side it was insisted that this annuity was the widow's bread, and it must be admitted to be due at the day of payment, from which day the party who was to pay this annuity, by with-holding it in his own hand did wrong, and ought to answer interest; at that time the widow might be necessitated to borrow money, and if she borrowed money must pay interest for it, consequently if liable to pay interest she ought by the same reason to receive it. (1)

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(1) Vide *Batten* v. *Earnley*, post. Vol. II. 163. Countess *Ferrers* v. Earl *Ferrers*, Ca. temp. Talb. 2. *Robinson* v. *Cumming*, 2 Atk. 411. *Newman* v. *Auling*, 3 Atk. 579. *Anon.* 2 Vez. 661. (*z*)

(*z*) *Car* v. *Burlington*, ante, 228. *Morgan* v. *Morgan*, 2 Dick. 643. *O'Donel* v. *Browne*, 1 Ba. & B. 262. Interest is not now given on the arrears of an annuity, even from the confirmation of the report ascertaining the amount due, *Bedford* v. *Coke*, 2 Vez. 116. 1 Dick. 178. *Creuze* v. *Hunter*, 2 Ves. jun. 157. 4 Bro. C. C. 157. 316. *Tew* v. *Winterton*, 1 Ves. jun. 451. *Anderson* v. *Dwyer*, 1 Sch. & L. 301. And see *Mellish* v. *Mellish*, 14 Ves. 516. *Shirt* v. *Westby*, 16 Ves. 393.

LITTON v. LITTON.

An annuity left the wife by the husband's will, shall carry interest from the day on which it was payable, and not only from the subsequent day of payment after the arrears incurred.

Cur': Interest is a thing pretty much in the discretion of the court; and since Lord Chancellor *Cowper, that great master of equity,* who heard the circumstances and merits of the cause, appointed the defendant Mr. *Robinson Litton* to pay interest from the very day that it became due, and since this appears to have been the widow's bread, the decree shall stand. (1)

[544] His Lordship added, he did not approve of the diversity that the interest should only be carried from the half-year after the default of payment; for supposing the payment were but yearly, should it carry interest but from a year after the expiration of the year, when what became due for this annuity was all the widow had to subsist upon?

Sed quære as to this; for it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due, if payable half-yearly, then from the next half-year day; if quarterly, then from the next quarter-day, and so has been the common rule in these cases; but the hardship of the principal case (tho' untruly suggested) and the weight of Lord *Cowper*'s decree before whom the whole merits of the cause were heard, seemed to influence the court in this matter.

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(1) Reg. Lib. B. 1718. fol. 448.

1908. a. c. 412.

1907. 1. Ch. 13.

1908. 1. Ch. 532.

CASE 159.

FARRINGTON *versus* KNIGHTLY.

LORD CHANCELLOR PARKER.

Pre. Cha. 566. 10 Mod. 442. 2 Eq. Ca. Ab. 421. pl. 2.

Executor has an express legacy, and so has the next of kin, and no disposition of the surplus; the surplus decreed to be distributed. †

ANTHONY Upton, late of *Lincoln's Inn,* esq. made his will, by which (*int' al'*) he declared as to his personal estate (if he should leave any) that he gave 50*l.* thereof to his brother *A.* 50*l.* to his nephew *B.* and made the said *A.* and *B.* executors, and gave 20*s.* a-piece to others of his relations, several of whom were his brothers, nephews and nieces, and as such his next of kin in equal degree within the statute of distribution,

† Vide *Rachfield* v. *Careless, Rutland* v. *Rutland,* post. Vol. II. 158. 210. accord. *sed vide Attorney General* v. *Hooker,* ib. 338. where Lord *King* was of a contrary opinion, conceiving that where the executor and next of kin had each of them a legacy, the undisposed surplus would by law belong to the executor, and he should retain it.

after which testator abruptly broke off without saying, *In witness whereof, &c.* or making * any disposition of the surplus, which amounted to about 1200*l.* [*545]

All the will was written with the testator's own hand, tho' not signed by him, and was proved in the spiritual court as his will.

They who were in equal degree of kindred with the executors brought this bill to have their shares of the surplus, according to the statute.

Mr. *Vernon* for the plaintiffs: The case which stands foremost in the court upon his head, is that of *Foster* (*a*) and *Munt*, where express legacies were given to the executors, and likewise to the next of kin; and it was decreed such executors were but trustees of the surplus for the next of kin; for where a legacy is given to an executor, if he was to have the surplus likewise undisposed of by the will, it would be giving him all and some.

(*a*) 1 Vern. 473.

Nay, it has been held in this court, that where there were two executors, and an express legacy was given to *one* of them only, this should exclude them *both* from the surplus; which is stronger than the principal case where legacies are given to *both* the executors, and even in the cases of the *Duchess of* (*b*) *Beaufort* (*c*) *Ball* v. *Smith*, *Littlebury* v. *Bulkley*, proof was admitted to shew it to have been the intention of the testators, that though the executors had express legacies, yet they should likewise have the undisposed surplus; but it would have been altogether unnecessary to prove such intention, if the executors were of course to have had the surplus.

(*b*) Ante, 114.
(*c*) 2 Vern. 675.

But farther, this case is stronger, in as much as the will is left imperfect without signing, and breaks off abruptly, whereas if the testator had lived to finish it, it is not to be supposed but he would have provided for those who were as near of kin to him as the executors themselves. [546]

On the other hand Sir *Robert Raymond* for the defendants admitted it to have been formerly the current opinion, that where an express legacy was given to an executor, and no disposition made of the surplus, the executor was but a trustee of such surplus for the next of kin; but said of late the resolutions had been otherwise; that accordingly it was so resolved in the case of *Ball* v. *Smith* by Lord *Harcourt* on great consideration and view of all the precedents; though it was true in that case the wife was executrix. That to the same effect was the resolution of the House of Lords in the

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case of the *Duchess of Beaufort*, and that of *Littlebury* v. *Bulkley*.

And as to what had been objected, that unless the executor should be held a trustee of the surplus, it would be giving him all and some; he said where a will gives the executor an express legacy, it may well be intended by the testator, that *in all events* the executor shall have his legacy, altho' there should come out to be no surplus; but that if any surplus shall remain, the executor shall have that surplus also. That the testator by making one his executor does thereby give him all his legal interest in the personal estate.

That the statute of distribution could not take place or have any effect were there was a will or an executor; forasmuch as that statute operated only upon *intestates' estates*, and the party cannot be said to die *intestate* where he has made an *executor*, and declared that *this is his will*; and as the present case was not within the statute of distribution, so, independent thereof there could be no distribution; and as often as the spiritual courts attempted to make any, the courts at *Westminster* (*a*) prohibited them.

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(*a*) Vide ante, 7. Petit *v.* Smith, and Vol. II. Edwards v. Freeman, 435.

Again, in making distribution upon the statute, it could not be doubted but the spiritual court had a concurrent jurisdiction with the court of equity: now in this case there being an executor, no distribution could be made in the spiritual court. On the contrary,

This will proved in the spiritual court, and appearing under the seal of the proper court which had the jurisdiction thereof, it was now to be intended and looked upon as a compleat will; and he cited a case, where upon a will which gave the executor an express legacy, an inferior court of equity (I think that of *Chester*) was compelling the executor to make a distribution; but the court of *C. B.* granted a prohibition; also the case of *Colesworth* v. *Brangwin*, † where a man made two executors, giving only one of them a legacy, and made no disposition of the surplus; after great consideration had of the point, *Lord Cowper* decreed the surplus equally to both executors; and to the same purpose was cited the case of *Rawlins* v. *Powel*. (*b*) Besides, that if an express legacy was to bar the executor from having the surplus, in this case there being express legacies given also to the next of kin, it was but just they should be barred in like manner.

(*b*) Ante, 297.

† Pre. Cha. 323. said to be decreed by Lord *Harcourt*. But there no demand appears to have been made by the next of kin; the bill being brought by one executor against the other.

In the last place, as to the case of *Foster* v. *Munt*, he observed that the resolution there was grounded upon the fraud made use of by the executors in prevailing with their testator to make his will at a (*a*) tavern.

(*a*) Ante, 116.

Mr. *Vernon* in reply: In *Foster* and *Munt*'s case there was not the † least proof of fraud; neither ought any will to be set aside in equity for fraud, as was said by the Lord *Cowper* in the case of ‡ *Goss* v. *Tracy*; for if the testator be imposed upon in the making of his will, then it is not his will.

He also cited (*b*) *Vatchell*'s case, where one made two persons executors, and gave them legacies without disposing of the surplus; but as two of his children were looked upon to be bastards, he gave them 20*s*. a-piece in full bar of all their claim and pretensions to any part of his estate; and the late Master of the Rolls let both them, and the rest of the testator's children in for the surplus of the personal estate, saying this was *digitus Dei;* but in the House of Lords upon an appeal, though the other children were allowed their share of the surplus, yet the two sons to whom 20*s*. a-piece was given in lieu of their claim, were not admitted to have any share thereof.

(*b*) Pre. Cha. 169.

Lord Chancellor: I do not take it to be a rule, that a will is not in any case to be set aside in equity for fraud; for I lately set aside such a will for fraud myself in the case of one *Bransby* ‖; I mean, I decreed the executor who gained the will, to be but a trustee. An executor from his name is but a trustee, he being to execute his testator's will, and therefore called an executor. In the present case the testator is not to

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† So said also by Lord *Harcourt* in the case of *Ball* v. *Smith*, 2 Vern. 678. & vide Pre. Cha. 567.

‡ Ante, 287. sed quære, for the contrary seems to have been affirmed in that very case by Lord *Cowper*.

‖ *Bransby* v. *Kerridge*, decreed *November* 14th, 1718, but this decree was, in *March* 1727, reversed by the House of Lords, and the bill on which it was founded dismissed. (1)

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(1) 3 Bro. P. C. 358. et vide *Marriot* v. *Marriot*, 1 Stra. 666. *Barnsley* v. *Powell*, 1 Vez. 287. *Bennet* v. *Vade*, 2 Atk. 324. *Meadows* v. *Duchess of Kingston*, Amb. 756. (*z*)

(*z*) *Griffiths* v. *Hamilton*, 12 Ves. 298. *Walton* v. *Walton*, 14 Ves. 318. *Lynn* v. *Beaver*, 1 Tur. 67. *Baillie* v. *Butterfield*, 1 Cox, 392. And see *Jones* v. *Jones*, 3 Mer 161. *Foy* v. *Foy*, 1 Cox, 164. *Gawler* v. *Standerwick*, 2 Cox, 15.

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be looked upon as dying intestate, but to have made the executor a trustee of the surplus; and this is the reason why the spiritual courts cannot compel a distribution, *because they cannot inforce the execution of a trust.* Indeed in the case of a wife it has been held, that where she is executrix and has a legacy, and there is no disposition of the surplus, she shall have it, but I do not hear any precedents cited that go further. This differs from other cases, by reason that the will seems to be left incompleat. It had been natural for any testator, (especially for a lawyer, as this was) to have said, "In witness whereof I have set my hand." And this will though it has a date, yet it is not signed, nor has it the usual conclusion, so that (probably) if the testator had not been interrupted, he would have gone on and disposed of the surplus; but as he has not done so, it seems to be left undisposed of; for which reason it ought to go according to the statute of distribution, as I think it would, if the clause of a will disposing of the surplus was rased and become not legible: It is highly proper the law should be settled one way or other in this case, though no great matter which way, so it be but known. For me to say in this case that the executors shall have the surplus, would be to make way for reversing multitudes of decrees which have ordered a distribution of the surplus in like cases, and occasion great confusion. I will consider of the case, and be attended with precedents, and will endeavour as far as I can to settle this point.

(*a*) June 10, 1721.

Accordingly (*a*) some time afterwards, each party having attended the Lord Chancellor with precedents, and his Lordship having taken time to consider of them delivered his opi-

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nion, that the executors having an express legacy of 50*l.* each, should be trustees of the surplus of the personal estate for the next of kin, according to the statute of distribution. (1)

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(1) The result of the many cases on this subject appears to be this.—By law the appointment of an executor vests in him all the personal estate of the testator, and if any part (after payment of the funeral expences and debts) remain undisposed of by the will, it rests with the executor *beneficially*—but wherever courts of equity have seen *on the face of the will* sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus in case of a compleat intestacy, *i. e.* the next of kin; as where the executors are expressly called executors *in trust*, or where any other expressions occur, shewing the *office* only to be intended them and not the *beneficial* interest. *Pring* v. *Pring*, 2 Vern. 99. *Rachfield* v. *Careless*, post. Vol. II. 158. *Graydon* v. *Hicks*, 2 Atk. 18. *Dean* v. *Dalton*, 2 Bro. C. C. 634. *Bennet* v. *Batchelor*, 3 Bro. C. C. 28. So, where there is a residuary clause,

His Lordship took notice of the precedents with which he had been attended: And

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First, As to the case of *Foster* and *Munt*, the decree in that was not founded upon the fraud, but the court declared that

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but the name of the residuary legatee is not inserted. *Wheeler* v. *Sheers*, Mos. 288. *Bishop of Cloyne* v. *Young*, 2 Vez. 91. Lord *North* v. *Purdon*, ib. 495. Or where the residuary legatee dies in the life-time of the testator. *Nicholls* v. *Crisp*, Amb. 769. *Bennet* v. *Batchelor*, ub. sup. So, a *pecuniary* legacy to a sole executor affords a sufficient argument to exclude him from the residue, as it is absurd to suppose a testator to give expressly a *part* of the fund to the person he intended to take the *whole*, *Cook* v. *Walker*, (cited) 2 Vern. 676. *Joslin* v. *Brewett*, Bunb. 112. *Davers* v. *Dewes*, post. Vol. III. 40. And it is settled (notwithstanding the case of *Ball* v. *Smith*, 2 Vern. 675.) that the wife being the executrix shall make no difference, as appears as well by the cases mentioned above in *Farrington* v. *Knightly*, as by *Gobsall* v. *Sounden*, 2 Eq. Ca. Ab. 444. pl. 58. *Martin* v. *Rebow*, 1 Bro. C. C. 154. So, *equal pecuniary* legacies to two or more executors shall exclude them from the surplus, *Petit* v. *Smith*, ante 7. and the several cases there mentioned. *Carey* v. *Goodinge*, 3 Bro. C. C. 110. The arguments that have been used in opposition to these decisions, and to shew that the giving *equal pecuniary* legacies to two or more executors is not absolutely inconsistent with an intention that they should take the surplus, are 1*st*, that such gift would secure to them a proportion of their legacies in the event of a deficiency of assets (which applies equally to the case of a *sole* executor), and 2*dly*, that they would take the legacies *severally*, whereas the residue would belong to them *jointly*. However the rule has long prevailed as above. Neither will legacies to next of kin vary the rule. *Wheeler* v. *Sheer*, Mos. 288. *Andrew* v. *Clark*, 2 Vez. 162. But wherever the legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right: and therefore where the gift to the executor is only an *exception* out of another legacy, it shall not exclude him from the residue, because it is necessary to make such exception expressly. *Griffith* v. *Rogers*, Pre. Cha. 231. *Hoskins* v. *Hoskins*, ib. 263. Lady *Granville* v. *Duchess of Beaufort*, ante, 114. *Jones* v. *Westcomb*, Pre. Cha. 316. *Gobsall* v. *Sounden*, ub. sup. *Newstead* v. *Johnston*, 2 Atk. 45. So, in *Lawson* v. *Lawson*, 7 Bro. P. C. 511. the same principle seems to have prevailed. So a legacy to one only of two or more executors shall exclude neither from the surplus, because the testator might intend to such one a preference pro tanto. *Colesworth* v. *Brangwin*, Pre. Cha. 323. *Mason* v. *Hawkins*, 4 Bro. P. C. 1. *Johnston* v. *Twist*, (cited) 2 Vez. 167. *Bishop of Cloyne* v. *Young*, ib. 91. *Wilson* v. *Ivatt*, ib. 166. The same rule and reason hold, where several executors have *unequal* pecuniary legacies. *Brasbridge* v. *Woodroffe*, 2 Atk. 69. *Bowker* v. *Hunter*, 1 Bro. C. C. 328. altho' in the last case *Darwell* v. *Bennet*, 2 Vern. 677. *Bailey* v. *Mead & Powell*, Pre Cha. 92. & 2 Vern. 361. and *Vachell* v. *Jeffrey*, Pre. Cha. 169. and 1 Bro. P. C. 167. were objected as authorities against the determination. Then as to *specific* legacies, it is determined that a *specific* legacy will exclude a sole executor. *Randall* v. *Bookey*, 2 Vern. 425. *Southcot* v. *Watson*, 3 Atk. 226. *Martin* v. *Rebow*, ub. sup. and also, that distinct *specific* legacies of *unequal* value to several executors shall not exclude them. *Blinkhorne* v. *Feast*, 2 Vez. 27. and the language of Lord *Hardwicke* in *Southcot* v. *Watson*, treats *specific* and *pecuniary* legacies as standing precisely upon the same ground in questions of this nature—however no case occurs in the boooks in which *distinct specific* legacies of *equal* value to several executors have excluded them

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the will excluded the executors from the surplus of the personal estate by having given them 10*l.* a-piece for their care and pains; and the testator by saying that the executors should have 10*l.* a-piece for their care, &c. plainly implied they should have no more.

(*a*) Pre. Cha. 81.

Secondly, (*a*) *Earl of Bristol* v. *Hungerford*, 9 Gul. 3. by Sir *John Trevor*, Master of the Rolls, where there was an express legacy of 100*l.* to the executors without disposing of the surplus; and his Honour decreed, that this legacy to the executors created a resulting trust of the residue of the personal estate for the next of kin.

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from the surplus. And the argument which supports this rule as to *pecuniary* certainly does not apply with equal force to *specific* legatees, since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, &c. &c. amongst his executors in *some particular manner*, altho' equally in point of value and consistently with an intention that they should take the surplus. *Shrimpton* v. *Stanhope*, (cited 3 Atk. 230.) is not a case of *distinct specific* legacies, for it appears from Reg. Lib. B. 1736. fol. 104. that the testator there gave some specific legacies to a man and his wife *jointly*, whom he also made his executors. And so, in *Willis* v. *Brady*, Barnard. 64. and these cases therefore seem like legacies to a sole executor. (*z*) With regard to the admission of parol evidence in cases of this kind, vide *Rachfield* v. *Careless*, post. Vol. II. 158. and *Rutland* v. *Rutland*, ib. 210.

(*z*) The rules laid down in Mr. Cox's note have been confirmed by the subsequent numerous decisions. See *Thornton* v. *Tracy*, 2 Ves. jun. 465. *Clennell* v. *Lewthwaite*, ib. and S. C. on app. ib. 644. *De Mazar* v. *Pybus*, 4 Ves. 644. *Dicks* v. *Lambert*, ib. 725. 4 Bro. C. C. 326. (in the last of which cases a bequest for life was held to exclude the executor from the residue.) *Nisbett* v. *Murray*, 5 Ves. 149. *Abbott* v. *Abbott*, 6 Ves. 343. *Urquhart* v. *King*, 7 Ves. 225. *Griffiths* v. *Hamilton*, 12 Ves. 298. *Southouse* v. *Bate*, 2 V. & B. 396. *Langham* v. *Sanford*, 17 Ves. 435. S. C. on app. 19 Ves. 641. & 2 Mer. 6. *Giraud* v. *Hanbury*, 3 Mer. 150. *Vezey* v. *Jamson*, 1 S. & S. 69. The circumstance of executors being appointed trustees of *part* of the personal estate, is not alone sufficient to exclude them from the residue, *Pratt* v. *Sladden*, 14 Ves. 198. And see *Dawson* v. *Clark*, 15 Ves. 409. S. C. on app. 18 Ves. 247. Where there are several executors, if the testator denotes an intention that one shall be a trustee, and is silent as to the others, the latter shall nevertheless be excluded, *White* v. *Evans*, 4 Ves. 21. *Milnes* v. *Slater*, 8 Ves. 295. *Sadler* v. *Turner*, ib. 617; but they may give evidence of the testator's intention in their favour, *Williams* v. *Jones*, 10 Ves. 77. In *Sealey* v. *Wood*, 10 Ves. 71. it was held that the bequest of a reversionary interest would exclude the executor; but see *Lynn* v. *Beaver*, 1 Tur. 63. Quære, if a legatee under the will, appointed executor by codicil, or *vice versâ*, shall be excluded? See *Mordaunt* v. *Hussey*, 4 Ves. 117. And see *Holford* v. *Wood*, ib. 90. *Muckleston* v. *Brown*, 6 Ves. 64. *Langham* v. *Sanford*, 17 Ves. 446. *Nourse* v. *Finch*, 1 Ves. jun. 344. And *Hornsby* v. *Finch*, S. C. on App. 2 Ves. jun. 78. and 4 Bro. C. C. 239. *White* v. *Williams*, 3 V. & B. 72. & Coop. 58. *Mence* v. *Mence*, 18 Ves 348.

Thirdly, (*a*) *Bayley* v. *Powell* in 1698, by Lord *Sommers*, legacies to all the next of kin of the testator, and a small legacy to the executors; in that case decreed the executors to be trustees.

(*a*) 2 Vern. 361.

Fourthly, (*b*) *Randall* v. *Bookey*, *January* 10. 13 W. 3. by Lord Keeper *Wright*, the testator made his wife executrix, and gave her an express legacy; the wife decreed a trustee of the surplus, according to the statute of distribution.

(*b*) 2 Vern. 425.

Fifthly, (*c*) *Ward* v. *Lant*, Hill. 13 W. 3. by Lord Keeper *Wright*, the testator made his wife executrix, to whom he gave some legacies, and hereupon she was decreed to distribute the surplus.

(*c*) Pre. Cha. 182.

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So that as to what has been said (*d*) heretofore, that there was but a single precedent of the wife's being left executrix and having an express legacy given her, wherein she was declared to be but a trustee for the surplus:

(*d*) By Lord Harcourt in Ball v. Smith. Vide 2 Vern. 678.

Lord Chancellor said he had now seen several of those decrees, and that they made no (*e*) difference where the wife and where a more remote relation had the executorship; for that still in all those cases, if there was no express disposition of the surplus, the executor, whoever it was, had been looked upon but as a trustee, with respect to such surplus, for the next of kin.

(*e*) Vide the same said by Lord Cowper, the case of Lady Granville v. Duchess of Beaufort, ante, 115.

And his Lordship said, that he had spoke with Mr. *Vernon* in his life-time † upon this subject, who said that there had been so many decrees upon the point where a legacy was given to an executor and no disposition of the surplus, that the executor was but a trustee of such surplus, and this point had been thereby so fully established, that he did not think it worth while to take notice of any latter decrees of this nature, apprehending it to be a principle as much fixed, as that fee-simple land should descend to the heir.

His Lordship likewise took notice of the precedents which had been left with him by the other side. As

First, the *Duchess of Beaufort*'s case, *February* 24, 1709, where the first Duke of *Beaufort* gave the use of his plate to his Duchess for life, whom he made executrix, and afterwards gave the plate to his grandson the late Duke, without disposing of the surplus; and decreed by Lord *Cowper* that the Duchess was but a trustee as to the surplus, for the next of kin; but reversed by the House of Lords; the reason of which might be, because this was not properly a devise to the Duchess of

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† Mr. *Vernon* died the *February* before this decree was pronounced.

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the use of the plate, but rather an exception or reservation to the Duchess, a devise of the plate to the grandson, reserving the use thereof to the Duchess the executrix for her life.

Secondly, Jones v. *Westcomb,* (1) Mich. 10 Annæ, by Lord Keeper *Harcourt,* where a lease for years was bequeathed to the executrix for life, with remainder over to *J. S.* and decreed that the executrix was not barred of the undisposed surplus; and this his Lordship held might be so, within the reason of the Duchess of *Beaufort*'s case; for it being an exception or reservation of the term to the executrix for her life, it was not properly a devise to the executrix, and consequently no bar.

(a) 2 Vern. 678.

Thirdly (*a*) *Ball* v. *Smith,* Hill. 10 Annæ, by Lord Keeper *Harcourt,* one devised some plate to his wife which she had as executrix to her former husband, and two other pieces of plate, in lieu of, and recompence for some other plate which likewise had belonged to his said wife as executrix to her former husband, but which the testator had himself disposed of; and made no devise of the surplus: Decreed, this should not bar the wife of the surplus of the testator's personal estate, for this reason, the devise to her of the plate which she before was intitled to as executrix of her former husband was void, the second husband having no power to dispose of that by his will, † tho' he might do it by act executed in his life-time; also as to the devise to her of the other plate, in lieu of, and recompence for what he had disposed of in his life-time, out of that which belonged to her as executrix, it must be reasonable to construe this as a restitution rather than a gift.

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His Lordship said there were several other precedents on each side, but these he thought to be the most material.

That as to the reason of the case it was most plain, the making a person executor ought not to amount to a gift of the testator's personal estate; it was no more than making him a trustee, the very word executor importing *ex vi termini* that he was only appointed to execute the will, and to have nothing but the management of the personal estate.

That this was demonstrable by a very common case: As if I make *A.* my executor, and say no more, and *A.* dies intestate, without disposing in his life-time of this personal es-

† But by the report of this case. 2 Vern. Lord *Harcourt* said he was content to have it considered as a legacy given by her husband.

(1) Pre. Cha. 316.

tate, (*b*) *my* next of kin, and *not* the next of kin of *my executor*, shall have administration *de bonis non*, together with all my personal estate.

(*a*) Vide post. Duke of Rutland v. Duchess of Rutland, Vol. II. 210.

Whereas were I to make *A.* my executor, and also *give him my personal estate*, and die, and afterwards my executor should die intestate, without disposing of my personal estate, the next of kin and administrator of my executor should have this personal estate, *and not my next of kin*, which is a demonstration, that the making a man executor is not giving him the personal estate; for in the one case only, where the personal estate is given to the executor, on the death of such executor, shall his next of kin have the personal estate, but not in the other.

That the executor is but a trustee, and such, as well with regard to the legacies given by the will to a (*a*) third person, as to the rest of the personal estate, is plain, in that if the testator by will gives a legacy (suppose the legacy of a horse) to *J. S.* and dies, still the legal property of this horse is in the executor, as much as the legal title to the rest of the testator's personal estate, and such legal property of the horse continues in the executor until he assents to the legacy.

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(*b*) Post. 575. Wind v. Albone.

By the statute of distribution the succession to the personal estate is as much settled and fixed in the next of kin (where it is not disposed of by the will) as by the common law the title to the real estate is fixed in the heir at law, if not given away by the will; and therefore it might in reason be a question, even if there were no express legacy given to the executors, nor any disposition of the surplus by the will; for it seems within the reason of the case, where a man by his will devises his real estate to *J. S.* for the payment of his debts, after payment thereof the devisee is clearly but a trustee for the heir.

Even so by making an executor, I make him a trustee of my personal estate for the payment of my debts; and if I do not give him the surplus, why should not such an executor *pari ratione* be a trustee for my next of kin? But this may be carrying it too far.

However, where the testator by express words has said that his executors should have 50*l.* a-piece out of his personal estate, it were offering violence to the will, for a court of equity to say such executors should not only have 50*l.* a-piece, but all the rest of the personal estate; this would be indeed saying, that such executors should have all and some.

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An executor has nothing in his own right, but what is expressly given him by the will, and so differs from an heir who is seised in his own right; and it is most reasonable, that where a testator gives his personal estate from his nearest relations, *he should say so*, else why should it be presumed? Besides this case is the stronger, in regard the will is plainly an imperfect and unfinished will; and it is not to be imagined but that if the testator had compleated it, he would have given a competency to his next of kin, which he has here not done.

Upon the whole; here being an express legacy of 50*l.* to each of the executors, and no disposition of the surplus of the personal estate, the executors are but trustees with respect to such surplus, which must go to the next of kin, according to the statute of distribution.

CASE 160. SIR MATTHEW JENISON *versus* LORD LEXINGTON.

Master of the Rolls.

2 Eq. Ca. Ab. 430. pl. 10. *J. S.* lessee of land to him and his heirs for three lives, assigns the whole estate, reserving a rent to him and his executors, and dies; his executors, and not his heir, are entitled to the rent.

A Tenant for three lives to him and his heirs, assigns over his whole estate in the premisses by lease and release, to *J. S*, and his heirs, reserving a rent of 10*l.* a year to the assignor, his *executors, administrators and assigns*, with proviso that upon non-payment the assignor and *his heirs* might re-enter, and the assignee covenants to pay the rent to *A.* the assignor, *his executors and administrators.*

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Objected, This rent reserved comes in lieu of land, and as the land would have gone to the assignor and his heirs, so shall the rent, and this is further explained by the proviso, which says the assignor and *his heirs shall enter.*

On the other side I insisted, that the assignor having parted with his whole estate for all the three lives, he had no reversion left in him to which the rent could be incident; and therefore it being by express words reserved to the executors, it should go to them for the three lives. That in case one seised in fee should lease the premisses for years, reserving the rent to the lessor and his executors, this would prevent the rent from going to the heir, though he had the reversion, and the rent in such case would (*a*) sink after the death of the lessor, and would not go to the executors, because they would not be intitled to the reversion to which the rent was incident; So if tenant for three lives were to make a lease for years, reserving a rent to

(*a*) 1 Inst. 47. a.

him and his executors, it would not go to his heir, neither to his executors; but in the principal case, there being no reversion to which the rent was incident, it might be reserved to the executors. For

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That when the whole estate was granted away, reserving a rent, the reservation of the rent was like a new grant from the assignee, and there was no doubt but a rent might be granted or assigned to one and his executors for three lives. That in *Sacheverel* (*a*) and *Frogate*'s case, where a man seised in fee leased the premises, reserving a rent to himself, his executors and administrators during the term, it was the words [during the term] which made it a good reservation to the heir.

(*a*) 2 Saund. 371. 367.

Cur': It is a plain case and no need of mooting it; here is no reversion to the assignor, and the rent is by express words reserved to the executor, the proviso for the heir to enter is not material, as long as the reservation of the rent is to the executor, for in such case the heir is a trustee for the executor; so dismiss the bill with costs.

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Afterwards (*b*) this matter came on again by a bill of interpleader of the Duke and Duchess of *Rutland*'s daughter, heir and executrix of Lord *Lexington*; at the hearing of which, Sir *Matthew Jenison* made default: and Lord Chancellor *King* said, that if the reservation were void, yet the covenant must be plainly good, which was to pay the rent to the executors and administrators of *A.* the assignor; but the Court inclined that here being no reversion, the rent during the three lives might be well reserved to the executors; and at length decreed it to the executors.

(*b*) Trin. Term. 1727.

BAUGH *versus* HOLLOWAY.

CASE 161.

ONE makes his will and (*int' al'*) devises lands to *A.* and his heirs, in trust to pay the testator's heir at law 200*l.* and there are three witnesses to the will, one of which is *A.* himself the devisee of these lands.

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2 Eq. Ca. Ab. 397. pl. 11.

One of the three witnesses to the will is a devisee of part of the land; whether not a good witness, if he aliens the land without covenant or warranty?

The heir brings his bill to impeach the will for want of three credible witnesses, in regard *A.* the devisee of the land is not a credible witness, but a party interested.

Whereupon Sir *Robert Raymond* observed, that it had been determined in the case of (*c*) *Hildyard* v. *Jennings* by Lord

(*c*) Carth. 514.

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Chief Justice *Holt*, that the will as to this devise only, was void, and then *A.* would be a good witness as to the rest (*a*) of the will.

(*a*) Vide Swinb. 296.

Nay, that even with respect to the lands devised to *A.* if *A.* had aliened such lands without any covenant or warranty, or had not by taking the rents and profits been liable to account, he would, according to the above mentioned resolution, have been a good witness to the whole will; just as if *A.* had been a legatee of money and (*b*) had released the legacy, there could in such case (as every day's experience shews) have been no objection to his evidence.

(*b*) Swinb. ubi supra.

The court said nothing as to this point, but that the heir ought to have contested the will at law; and if it had been adjudged against him there, (*viz.*) that the will was good, then he might have come here for the 200*l.* wherefore retain the bill for a year from *Michaelmas* term next, that the plaintiff may have two assizes to try this will, but let the plaintiff pay the defendant his costs. (1)

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(1) Vide Stat. 25 G. 2. c. 6. et vide *Wyndham* v. *Chetwynd*, 1 Burr. 414. (in which this case of *Baugh* v. *Holloway* is stated by Lord *Mansfield* from the Register's book, and the credibility of witnesses attesting a will is considered at large.) *Hindson* v. *Kersey*, 4 Burn. Eccl. Law, 86. (*z*)

(*z*) *Lees* v. *Summersgill*, 17 Ves. 508. *Hatfield* v. *Thorp*, 5 B. & A. 589. And see *Goss* v. *Tracy*, ante 289.

22. Ch. D. 668.

CASE 162.

MARLOW *versus* PITFEILD. (*y*)

2 Eq. Ca. Ab. 316. pl. 6. One borrows money during his infancy, and applies it to the buying of necessaries, and afterwards coming to age, devises his lands for payment of his debts; this debt contracted during infancy is within the trust.

ONE *Pitfield* an infant, whose estate was considerable, but consisted chiefly of a reversion after his father's death, having married without his father's consent, was thereupon discarded by him, and forced to take a house for himself and his wife. Not long after this he attained his full age, and having during his infancy borrowed money (which money so borrowed amounted to 130*l.*) and therewith bought some ne-

(*y*) See *Davis* v. *Austen*, 3 Bro. C.C 178, and 1 Ves. jun. 247. *Lee* v. *Brown*, 4 Ves. 362. *Cory* v. *Gertcken* 2 Mad. 40, 1 Fonb. Eq. Book 1. c. 2. s. 4.

cessaries, made his will, devising his real estate to trustees for the payment of his debts with interest. MARLOW v. PITFEILD.

The question was, whether the monies actually advanced to the testator *Pitfeild* during his infancy were to be paid within this trust. [559]

His Honour the Master of the Rolls took time to consider of it, and now gave his opinion that this money actually lent to the testator, though during his infancy, was within the trust and ought to be paid.

First, The court admitted that if an infant be sued in an *assumpsit* for money lent him during his infancy, the defendant may plead *non assumpsit*, and give the infancy in evidence, which demonstrates that the promise or contract is void, and therefore to be given in evidence on *non assumpsit*, as was resolved by *Treby* Chief Justice. (*a*) And the diversity is betwixt the deed or bond, and the bare promise of an infant; for though the latter be merely void, so as to enable the defendant to plead *non assumpsit*, yet in case of the former, the infant cannot avail himself of the plea of *non est factum*, but must plead his infancy.

(*a*) Salk. 279. 386, 387.

Secondly, Though the law be, that if one actually lend money to an infant, even to pay for necessaries, yet as the infant in such case may waste and misapply it, he is therefore not liable, according to the resolution in Salk. 279. It is however otherwise in equity; for if one lends money to an infant to pay a debt for *necessaries*, and in consequence thereof the infant does pay the debt, here although he may not be liable at law, he must nevertheless be so in equity; because in this case the lender of the money stands in the (*b*) place of the person paid, *viz.* the creditor for necessaries, and shall recover in equity, as the other should have done at law.

Infant borrows money, and applies it towards payment of his debts for necessaries; infant liable to pay this in equity, tho' not at law.

(*b*) Vide ante, 483. Harris v. Lee.

Thirdly, His Honour thought that as equity should take care of creditors, so it ought to shew its concern for infants, and not give any encouragement whereby these might be drawn in during their infancy to take up such sums as might ruin them; and therefore had there been in the principal case the least circumstance of fraud, or had the money been advanced to supply the infant's extravagancies, he should have been of a different opinion; but here the principal sum being but 130*l.* and the infant's estate considerable, and he being on his father's displeasure left destitute and obliged to borrow money for his necessary support, it could not be imagined but had the testator been now living, and been asked the question, whether the debts which he had actually and without fraud [560]

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contracted, should be paid within the trust? he would have said that they ought to be paid.

Wherefore considering all circumstances, and particularly since he did not barely desire that his debts should be paid, but with interest also (which is unusual); it was decreed, that this money actually lent as aforesaid, though during the testator's infancy, was within the trust.

CASE 163.

Ex parte SALKELD.

LORD CHANCELLOR PARKER.

Tho' a creditor comes into a commission of bankruptcy, and proves his debt, and is prevailed on to be an assignee, (being informed that otherwise he should lose his debt, yet if the bankrupt has no estate, the creditor may take the bankrupt in execution, if he will waive any benefit of the statute. (1)

SALKELD was a clothier in town, and *Hale* made cloth in *Wiltshire*; *Salkeld* was indebted to *Hale* in 180*l.* for cloths, and afterwards by bill of sale assigned over these cloths *int' al.* to his father-in-law *Jackson* towards satisfaction of a debt pretended to be due from him to *Jackson.*

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Hale brought an action at law against *Salkeld,* and having obtained judgment took him in execution on a *Ca. Sa.* and this was about two years since; and an act was made the (*a*) last session, whereby a bankrupt, in case he surrenders himself, be examined, and four fifths in value and number of his creditors sign his certificate, and testify their consent, &c. is to be discharged.

(*a*) Vide 5 Geo. cap. 24.

After this, the bankrupt's father-in-law takes out a commission of bankruptcy against *Salkeld,* under which *Hale* is prevailed on to come and be assignee, being told that otherwise the bankrupt's father-in-law would sink the estate and get him discharged.

It proved that the bankrupt's remaining estate was but some few shillings, and some desperate debts.

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(1) Ex parte *Capot*, 1 Atk. 219. Ex parte *Ward*, ib. 153. Ex parte *Lindsey*, Ex parte *Dorvilliers*, ib. 220, 221. (*z*)

(*z*) See *Ex parte Wright*, 2 Ves. jun. 9. *Ex parte Cundell*, 6 Ves. 446. *Ex parte Knowell*, 13 Ves. 192. *Ex parte Parquet*, 14 Ves. 493. *Ex parte Warder*, 1 Cooke's B. L. 132. *Ex parte Benjamin*, Buck 41. *Ex parte Frith*, 1 Gl. & J. 165, Stat. 6 G. 4. c. 16. s. 59, post. Vol. II. 395, note (*z*).

Salkeld the bankrupt petitions that he might be discharged out of execution, since *Hale*, at whose suit he was taken in execution, had come into the commission, and proved his debt, nay was the assignee under the commission, and that this had been often settled; nor could it make any diversity, whether the bankrupt's estate was great or small, for the creditors could have but all: that though *Hale* had proposed waiving all benefit and advantage accruing from the commission, yet this was now too late, he having come in under it, proved his debt, and consented to be assignee, which was a plain election to proceed this way, and being once made could not be waived afterwards. EX PARTE SALKELD.

On the other side it was insisted, that if fraud appeared on the bankrupt's side, and an honest debt on the creditor's, equity ought not to interfere in prejudice of the honest creditor, and in favour of the fraudulent bankrupt; which *Lord Chancellor* admitted. [562]

That here was fraud apparent, when the bankrupt's father-in-law took out the commission, which must be intended in favour of the bankrupt, and not of his creditors; whereas the creditors' good is the proper end of suing out commissions.

That it might be thought necessary *Hale* should prove his debt before the commissioners in order to oppose the bankrupt's discharge; and this was held to be reasonable by *Lord Chancellor*. The reason of a creditor's coming in under the commission, and proving his debt, may be to oppose the bankrupt's being discharged.

That the reason of its having been frequently ruled that a creditor could not come in before commissioners, and then detain the body of the bankrupt in prison, was, because it would be unconscionable the creditors should detain the bankrupt's body in custody for non-payment of his debts, and yet seize all his estate wherewith he was to pay them; but this case differed, the bankrupt having no estate left to seize, in regard all had been before made away by the bill of sale to his father-in-law.

That another reason why the creditor should not detain the bankrupt's body in prison for a debt, was because by coming into the commission the creditor *elected* to have the benefit of the bankrupt's estate towards satisfying his debt, and therefore ought to waive his former execution of the body; but here could be no election of an estate where there was none; and this was like the case of an *elegit* to extend the moiety of the land, where after such an execution, the plaintiff, it was true, could not take the person of the defendant, but if the sheriff should return that there was no land, this would be no elec- [563] No election in case of a creditor's coming in under the commission to be paid out of the bankrupt's effects, if no effects.

EX PARTE SALKELD.

tion, and the plaintiff might afterwards take the body of the defendant. Notwithstanding, that in this case the creditor, to shew he was satisfied there was no estate of the bankrupt left to be distributed, was willing to waive all benefit and advantage under the commission.

Argument of fraud, if the commission be sued out by the bankrupt's father, in order to discharge the bankrupt.

Cur' : This commission is plainly sued out fraudulently by the bankrupt's father-in-law to discharge the bankrupt out of custody; the proposal is fair on the creditor's side, to waive any benefit under the commission, and therefore ought to be accepted; the creditor cannot be said to elect to be satisfied out of the estate, where there is none, which more particularly distinguishes this case.

I will not discharge this bankrupt to the prejudice of a creditor, where it appears on the face of the thing, that the commission was sued out in favour (*z*) of the bankrupt himself by his father-in-law, and not for the service and advantage of creditors.

(*z*) *Ex parte Grant,* 1 Gl. & J. 17.

5. Sim. 264.
2. Russ. Chyl. 383.
8. Sim. 24.
2. Bea. 586.

CASE 164.

1. Hare. 430.

PINBURY *versus* ELKIN. (1)

LORD CHANCELLOR PARKER.

2 Vern. 758. 766. Pre. Cha. 483. 2 Eq. Ca. Ab. 346. pl. 9.

ONE makes his wife executrix, and gives her all his goods and chattels; provided that if *she shall die without issue by the said testator, then after her decease* (*y*) 80*l.* shall remain to the testator's brother *J. S.* Afterwards the testator dies.

One possessed of a personal estate, devises, if his wife dies sans issue by him, that then 80*l.* shall be paid to his brother, good. Also good, though the brother dies in the life of the wife.

1. Young & C. 498
23. ch. D. 161.
24. —— 105.

[564]

J. S. the testator's brother dies in the life-time of the testator's wife, and then the wife dies without issue, upon which the questions were, *first,* whether this legacy of 80*l.* was originally good, it being to take effect in case the testator's wife should die without issue by the testator?

Secondly, Whether if originally good, it was not since be-

(1) Reg. Lib. B. 1718. fol. 511.

(*y*) See *Wilkinson* v. *South,* 7 T. R. 555. *Donn* v. *Penny,* 1 Mer. 22.

come void by the death of *J. S.* the legatee in the life-time of the testator's wife, and before the contingency happened?

This case being argued before *Lord Chancellor*, his Lordship took time to consider of it, and now gave judgment.

The several senses of the words [dying without issue].

He said, that the words [dying without issue] had several senses (*a*); as *first*, a legal sense, when there was a failure of issue of tenant in tail, so as to intitle the remainder-man, or reversioner to a *formedon* in remainder or reverter, which is, whenever there is a failure of issue of the body of tenant in tail.

(*a*) Ante, Nichols v. Hooper 198.

Secondly, Another sense of dying without issue was, if the party died *without ever having had issue*, and that was the sense put upon these words in the case of *Brett* v. *Pildridge*, cited in 1 Sid. 102. and in 1 Keb. 248. 462. where a man gave a portion with his daughter in marriage, and the husband covenanted with his father-in-law to repay him 500*l.* part of the portion, if the daughter should die without issue within two years after the marriage; the daughter had issue within two years, but she, and afterwards her issue died without issue within the two years; and the case coming on in chancery was referred to the opinion of four judges, who all held, that the father should not have any of the portion back again, in regard there *once* had been issue of the marriage. (*z*)

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Thirdly, But by the third sense of a person's dying without issue, is intended *without leaving issue at the time of his* (*b*) *death*, and in this sense the words [dying without issue] shall be taken in the principal case; which indeed seems to be the natural meaning of these words: for taking the case to be that *J. S.* dies leaving a son, and afterwards that son dies without issue, and one should ask any gentleman (not of the bar) whether *J. S.* died without issue? It would be naturally, truly, and properly answered, No: *J. S.* did not die without issue, but left issue a son; but that son is since dead without issue, so that *now* *J. S.* is dead without issue; for the words [die without issue] are relative to the death of the party, and it is plain that at *J. S.*'s death, when he left a son he did not die without issue.

(*b*) Ante, ubi supra, & post. Forth v. Chapman, 666.

Moreover, in the principal case, the words import strongly that they are to be intended in this sense (to wit) dying without issue *living at the party's death*, because the legacy of 80*l.* (being the legacy in question) if the wife should die without

(*z*) *Bell* v. *Phyn*, 7 Ves. 453.

PINBURY *v.* ELKIN.

issue by the testator, then after her decease is to remain to the testators brother (*a*), which words *then after* i. e. *immediately after*, would be inconsistent and repugnant, if the dying without issue should be taken in the other sense whenever there shall be a failure of issue; for this would be carrying the payment beyond the day; it would be as absurd as to appoint the day of payment to be to-morrow if it shall rain this day twelvemonth, which is to make the condition over-reach the day of payment. (1)

(*a*) See Hughes v. Sayer, ante, 534.

Also his Lordship said, that taking the 80*l.* as intended to be given whenever there should be a failure of issue of the body of the testator's wife by him; this would be a strange clog upon a personal estate, and subjecting it to the payment of a sum of money (as it might happen) one hundred years hence, when it would be no kindness to the legatee, in whose favour it was (*b*) *personally* intended; but by that time he must be supposed to be dead, and it might be difficult at such a distance of time to find out his representatives. Not but that a covenant to pay a sum of money when there should be a failure of issue of the body of *B.* would surely be (*c*) good.

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(*b*) Vide ante, Nichols v. Hooper, 198.

(*c*) Vide post. Pleydel v. Pleydel, 750.

As to the other point in the principal case, that the testator's brother who was the legatee of the 80*l.* in question, was dead before the happening of the contingency, that is, before the testator's wife died without issue, the Court said, they were of opinion, this possibility would go to the executors of the legatee. That it was true, in Swinburne, 461, 462, *&c.* some cases were put which seemed to import the contrary; but those cases were so darkly put, and with so many inconsistencies, as to be all over-balanced by the opinion of Lord *Nottingham* in 2 Vent. 347. (*anonymous* case,) where a man devised 100*l.* to *A.* at the age of twenty-one years, and if *A.* died under age, then to *B.* *B.* died in the life time of *A.* and afterwards *A.* died under age, yet decreed that the executors of *B.* should have this 100*l.* (2)

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(1) Sed Vide *Beauclerk* v. *Dormer*, 2 Atk. 311. *Bigge* v. *Bensley*, 1 Bro. C. C. 190. as to the effect of the word "then" in limitations of estates and framing contingencies. (*z*)

(2) *King* v. *Withers*, Ca. temp. Talb. 117. *Dawson* v. *Killet*, 1 Bro. C. C. 119. *Barnes* v. *Allen*, ib. 181. (*y*) *Selwin* v. *Selwin*, 2 Burr. 1121. and 1 Bla. Rep. 231. *Moor* v. *Hawkins*, 1 H. Bl. 34. (*x*) *Jones* v. *Roe*, ib. 30. and 3 T. R. 88. (*w*)

(*z*) *Benyon* v. *Maddison*, 2 Bro. C. C. 75. *Ellis* v. *Ellis*, 9 East, 382.

(*y*) See this case stated from the Registrar's book, 3 Ves. 208.

(*x*) 2 Eden, 342. S. C.

(*w*) *Perry* v. *Woods*, 3 Ves. 204. *Massey* v. *Hudson*, 2 Mer. 130.

Therefore decreed that the plaintiff shall have his legacy of 80*l.* with interest from the death of the testator's wife, and also his costs.

PINBURY *v.* ELKIN.

[567]

CANN *versus* CANN.

CASE 165.

THE plaintiff examined witnesses *de bene esse,* and afterwards examined them in chief, and the cause was heard; but the Court taking time to consider of it, and the defendant observing that some of the witnesses examined by the plaintiff to prove the will in question (which was by the plaintiff alledged to be made by Sir *Robert Cann* the defendant's father subsequent to that will under which the defendant claimed, who was the younger son of the said Sir *Robert Cann*) had confessed, that they would not swear the defendant's father did ever sign the said will, and that yet the same witnesses, when examined in chief, had sworn positively the said defendant's father Sir *Robert Cann* did sign the will, which pretended will was alledged by the plaintiff to have been suppressed by the defendant's mother-in-law, and by the defendant himself.

LORD CHANCELLOR PARKER.

See more relating to this case, post. 723.

Court refused to publish depositions de bene esse, in order to compare them with the depositions in the same cause, taken on an examination in chief. (*z*)

The defendant having reason to believe, that the witnesses when examined *de bene esse* did not swear so fully as they had been prevailed upon to do when examined in chief, petitioned the *Lord Chancellor,* that these depositions *de bene esse* might be published, or at least that his Lordship would be pleased to order them to be brought before *him* for his inspection, which in this case his predecessors Lord *Sommers* and Lord *Cowper* had done, in order to satisfy themselves whether the cause which had slept so long as —— years, should proceed or no.

And for the petition it was urged, that it could not be thought that the plaintiff himself should oppose this prayer, it being only to discover truth, which the plaintiff would hardly own he was afraid should be discovered. That though this was not known to have been done before, yet the reason was, because it might be a wrong to *the defendant* to have

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(*z*) As to publication of depositions *de bene esse,* see *Harris* v. *Cotterell,* 3 Mer. 678. *Teale* v. *Teale,* 1 S. & S. 385. And see *Bowden* v. *Hodge,* 2 Swan. 258.

CANN v. CANN. these depositions published; for that the defendant would have no opportunity of cross-examining the witnesses which the plaintiff had examined *de bene esse*; but when the defendant himself desired to have these depositions published, *volenti non fit injuria.*

Lord Chancellor: It is admitted on both sides, that what is now asked, (*viz.* the publication of the depositions taken *de bene esse*) was never yet done; and it being without any precedent, there ought to be very strong reasons to prevail with the Court to do it. The reason why the Court allows the taking of depositions *de bene esse* is, either from a contempt of the party in not answering, and thereby preventing the joining of issue, or else where the party is in danger of losing his witnesses in case of death, by reason of sickness or age, so that there may be ground to apprehend their not living to be examined in chief, but if these witnesses do live and are examined in chief, their dispositions *de bene esse* shall fall to the ground, and are as it were buried, having answered the whole purpose for which they were taken.

The reason of examining a witness de bene esse. (*z*)

If the depositions *de bene esse* in the present case were to be published, or any ways made use of against the witness so examined *de bene esse*, such witness ought to have a copy of the depositions before he is examined in chief; to the intent that he may have due cautionary means allowed him, (*y*) to prevent his contradicting himself, which is always done in the like cases; also many questions might arise, if it should happen that the depositions *de bene esse* were quite contradictory to the depositions in chief; for I do not think it can be perjury at † law, there being no issue joined, as there must be before the depositions are taken in chief.

Whether a prosecution for perjury will lie on a deposition taken de bene esse.

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And as to seeing these depositions *myself*, it is true, Lord *Sommers* and Lord *Cowper* did order copies to be brought to them to inspect; but that was for enabling them the better to judge whether the plaintiff in those causes, after so long time elapsed since the commencement of them, and so many transactions in them, should be allowed after the plea to proceed

† Cro. Car. 352. 3 Inst. 167. And yet it seems as if such depositions taken *de bene esse*, upon a bill to perpetuate the testimony of witnesses, where there is no issue joined, on the death of the witnesses may be read in evidence. Carth. 265. (*x*)

(*z*) See *Phillips* v. *Carew*, ante 117.

(*y*) See *The Queen's case*, 2 Bro. & B. 284. 286. 299.

(*x*) See *King* v. *Allen*, 4 Mad. 247. *Rex* v. *Aylett*, 1 T.R. 69. *Crew* v. *Vernon*, Cro. Car. 97. *Calliand* v. *Vaughan*, 1 Bos. & P. 210.

to a hearing; but as this cause has since proceeded to a hearing, for me to read these depositions *de bene esse*, in my study, if I should here form any judgment upon them, it would be strange that *that* should guide me, which no other person is to know any thing of. CANN v. CANN.

No, let all people be at liberty to know what I found my judgment upon; that so when I have given it in any cause, others may be at liberty to judge of *me*.

Whereupon the petition was dismissed, the Court refusing to publish the depositions taken *de bene esse*.

Note; Mr. *Vernon* who was against publishing these depositions insisted very much, that what was asked was without precedent; tho' what was now surmised, must have often before happened, and nothing was sworn in the depositions after issue joined, but what was very probable, namely, that a father who had made his will in favour of his younger son, on that younger son's drawing his sword against his father, and attempting to take away his life, should afterwards revoke this will which he had before made in favour of such younger son.

DE TERM. S. MICHAELIS, 1719. [570]

CUD *versus* RUTTER. (*z*)

CASE 166.

THE defendant, in consideration of two guineas paid down, did by note under hand agree to transfer 1000*l.* *South-Sea* stock at a fixed price at the end of three weeks; the plaintiff on the day demanded the stock, and offered to pay the price; but on the defendant's insisting that he would only pay the difference, and not transfer the stock, the plaintiff brings this bill for a specific performance, and to have the stock assigned.

Objected, That the compelling a specific execution of contracts must be allowed to be discretionary in this Court, and

At the Rolls. See this case cited in Pre. Cha. 534. by the name of Scould v. Butter. 2 Eq. Ca. Ab. 18. pl. 8. Bill in equity will not lie for a specific performance of an agreement to transfer South Sea stock. (*y*)

(*z*) S. C. more fully reported, 5 Vin. Abr. 538. pl. 21.

(*y*) See Stat. 7 G. 2. c. 8. made perpetual by 10 G. 2. c. 8.

CUD v. RUTTER.

there was not a single instance or precedent, where it had been done in such a case as this; that the plaintiff was put to no inconvenience, since the defendant had offered, and by his answer continued to offer, to pay the difference; that the plaintiff might for asking have the same quantity of stock any
[571] where upon the exchange. Indeed, had the agreement been for a house or land, which might be a matter of moment and use, in that case, (supposing all things to have been fairly transacted) there might be some reason why equity should execute such agreement; but in a matter of so little consequence as the present case, there could be no necessity for this Court to interpose.

Cur': The plaintiff ought to have an execution of the contract; for the agreement is a fair one, and in writing, and part of the money paid. Suppose the whole money had been paid, should not equity have executed it? if so, where is the difference betwixt a great sum and a small one? if the agreement had been to transfer stock or pay the difference, this might have looked like stock-jobbing; but the plaintiff, as is proved in the cause, refused to let the note be so penned, notwithstanding that the defendant had desired it. Decreeing an execution of such an agreement, is beating down and preventing stock-jobbing. Wherefore let the defendant transfer 1000*l.* *South-Sea* stock accounting for the dividends, and paying the costs; and let the plaintiff pay the defendant interest for the money from the time that it ought to have been paid, according to the contract. (1)

But afterwards on an appeal, the Lord Chancellor *Parker* reversed this decree, delivering his opinion with great clearness, that a court of equity ought not to execute any of these contracts, but to leave them to (2) law, where the party is to recover damages, and with the money may if he pleases buy the quantity of stock agreed to be transferred to him; for

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(1) Reg. Lib. A. 1719. fol. 35.

(2) So, *Cappur* v. *Harris*, Bunb. 135. but cases of this kind depend so much on their own particular circumstances, that it seems, no general rule can be laid down. *Colt* v. *Netterville*, post. Vol. II. 304. *Thompson* v. *Harcourt*, 2 Bro. P. C. 415. *Buxton* v. *Lister*, 3 Atk. 383. (*z*)

(*z*) And see *Arundell* v. *Phipps*, 10 Ves. 139. *Nutbrown* v. *Thornton*, ib. 159. *Wright* v. *Bell*, 5 Price 325. Daniell, 95, and note there, p. 101. *Withy* v. *Cottle*, 1 S. & S. 174. *Doloret* v. *Rothschild*, ib. 590. *Adderly* v. *Dixon*, ib. 607.

there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land, but 1000*l.* *South-Sea* stock, whether it be *A. B. C.* or *D.*'s is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself. (1)

CUD *v.* RUTTER.

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(1) Reg. Lib. B. 1719. fol. 411. "His Lordship declared he did not "think a specific performance of the "said agreement to be reasonable, and "doth therefore order that the plaintiff's "bill, so far as seeks a specific perform-"ance of the said agreement, be dis-"missed. But his lordship declared "that the defendant not having acted "fairly, but having given occasion to "the plaintiff to hope that he would "transfer the stock, he thought it rea-"sonable that the defendant should not "only lose his costs which he would "otherwise have been entitled to, but "that he should pay the plaintiff the "difference of the stock, not only as it "was upon the 20th of *November* 1718, "but as it was when the plaintiff bought "his stock" (*i. e.* the 23d of *December* following, on which day plaintiff gave notice to the defendant that he should attend at the South-Sea house, to accept the stock to be transferred by the defendant, and upon the defendant's not attending the plaintiff purchased 1000*l.* stock on that day at 118¾ *per cent.*) "and it appearing that the plaintiff "bought afterwards at 118¾ *per cent.* "which is 14*l.* 5*s.* more than the de-"fendant was to deliver the stock at, "doth therefore order that the defen-"dant do pay the plaintiff after the rate "of 14*l.* 5*s.* *per cent.* for 1000*l.* with "interest for the same from the time "the plaintiff bought his stock."

WIND *versus* JEKYL AND ALBONE.

CASE 167.

ONE possessed of a term for years devised it to *A.* for life, remainder to *B.* *B.* in the life-time of *A.* devised his remainder to *J. S.* who devised it over; upon which the question now was, whether *A.* (the devisee for life) being dead, the devisee of *J. S.* should have the term, or whether it should go to the administratrix *de bonis non*, with the will annexed of *B.*?

LORD CHANCELLOR PARKER.

A. devises a term for years to B. for life, remainder to C. C. in the life of B. devises his remainder.

This is good, and amounts to C.'s declaring by his will, that his executor shall stand possessed of the term, in trust for the devisee. Vide Pollexf. Rep. 44. Veizy v. Pinwell, this very point determined 16 Car. 1. by the then Lord Keeper. (*z*)

For the latter it was objected, that there were no creditors or purchaser for a valuable consideration concerned, so as to merit the assistance of a Court of equity; that in the notion of

(*z*) See *Hyde* v. *Parratt*, ante 1. *Roe* v. *Jones*, 1 H. Bl. 30. *Moor* v. *Hawkins*, 2 Eden, 342. *Jones* v. *Roe*, 3 T. R. 88. *Doe* v. *Tomkinson*, 2 M. & S. 165.

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law, *A.*'s life was of longer continuance than any term for years, and the law must be the same either in the case of a long or short term; and since the first devisee for life might possibly survive the term, and so the devise over be good for nothing, for this reason *B.* had originally but a possibility. Then if nothing vested in *B.* until the death of *A.* who during his life had the whole term in him, (as the law said he had) it followed that *B.* having nothing in him till the possibility fell, could transfer nothing to another, *nihil dat qui non habet;* and that *B.* the devisee in remainder could not assign over this term, was said to appear from a case cited in 4 Co. 66. *b.*

[573] *Fulwood*'s case, as also from 10 Co. 47. *b. Lampett*'s case, where it is observed to be the wisdom of the law, that possibilities and *choses en action* are not grantable over, (so that possibilities and *choses en action* were put on the same foot) and it was plain that a bond or *chose en action* was not assignable, but the assignee must sue in the assignor's name.

Against which I urged, that however the legal title to the remainder of this term after the death of *A.* might belong to the administrator *de bonis non* with the will annexed of *B.* yet this court, which considered the intention of the parties, and particularly in wills, would look upon the administrator in this case but as a trustee for the devisee; just as if *B.* had by his will given the remainder of this term to *J. S.* and made *J. N.* executor *quoad* the term, this had been plainly making the latter a trustee for the former; that agreeable to this were former resolutions, as in Moor, 806. *Cole* v. *More,* where one possessed of a term devised it to *A.* for life, remainder to *B.* and made *A.* executor, *B.* devised his remainder to *C.* and died in the life of *A.* and in order to defeat *C.* of his interest, *A.* assigned his term to a third person. Decreed by Lord Chancellor *Ellesmere,* that *A.* the executor and devisee for life was a trustee for *B.* and should not be at liberty to destroy this remainder, but that the executor should preserve the lease, so as it might go according to the will with the performance whereof the executor was intrusted.

Nay, in 1 Chanc. Cases, 4. *Goring* v. *Bickerstaff,* when the trust of a term was devised to *A.* for life, remainder to *B.* it was agreed by all *in one uniform opinion,* (says the book) that *B.* might assign over this trust, which goes further than the former case, as it shews that a trust of a term in remainder may be transferred over by deed.

[574] And as to what was cited from *Lampett*'s case, that possibilities and *choses en action* are put upon the same foot, it being

plain an obligee in a bond might devise away his bond, there could be no doubt but the devisee over in the present case might devise his remainder. So if *B.* the remainder-man should have assigned over his interest for a valuable consideration paid by the assignee, though this was void at law, yet it had been good † in equity, and whenever such remainder of the term had come into possession, *B.* had, as trustee for his assignee, been compellable in equity to have conveyed the term to him; and it would have been as strong, as if *B.* for a valuable consideration had covenanted to assign over the possibility to the purchaser, whenever it should fall into possession, which surely had been good.

Lord Chancellor: It has been resolved, and the law is so, that *B.* the devisee in remainder cannot by deed assign over this possibility; for in law no estate vests in *B.* during the life of *A.* and he having nothing can transfer nothing.

Anciently there were rarely any leases for years but what were for a short time; for which reason they were esteemed to be of less continuance than an estate for life; and for the same reason such lessee could not at common law falsify a feigned recovery. (*a*) 1 Inst. 46.

But the law is very different now, as to terms for years, from what it was formerly; in ancient times there were no leases for years but what were for short terms, which were very little regarded; this was the reason why, if a real action were brought against the person who had the freehold, and a recovery was thereupon had, though by covin, yet the lessee for years, whose estate was precedent to the freehold, was (*a*) bound by this recovery, and could not falsify until the * statute of 21 H. 8. cap. 15. and therefore the leases for years usually made being but short, a life was presumed to have a longer continuance than any term, and therefore the devise of such a term after a life was void.

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Diversity betwixt the devise of a real estate and the devise of a personal estate; as if I devise all my real and personal estate, and afterwards purchase more of each kind, only the personal estate that is purchased afterwards shall pass, and why.

Again, a devise of a lease for years differs from a devise of a freehold or fee-simple; for instance, one cannot devise fee-simple land, which he has not at the time of making the will; but ‡ leases or personal estate, though they were not the testator's at the time when he made his will, yet if they be his at the time of his death, shall pass by the will. Therefore, if

† That a possibility of a term is assignable for a good consideration, was (*int' al'*) determined in the case of *Theobald* v. *Duffay*, in the House of Lords, in *March* 1729-30. (1)

‡ *Masters* v. *Masters*, ante 424. sed vide Salk. 237. *Bunter* v. *Cook*, where the court was in doubt, whether a chattel real which the testator had not at the time of making the will, would pass thereby.

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(1) Vide *Higden* v. *Williamson*, post. Vol. III. 132. Fearne's Contingent Rem. 439.

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one devises all his real and personal estate, and afterwards acquires more of each kind, the real estate acquired afterwards, shall not pass; *secus* as to the personal estate; and yet the intention of the party must have been the same as to both: but I take the reason of this difference to be, that with regard to the real estate bought after the making the will, supposing *that* not to pass, still there is one in law capable of taking it, (*viz.*) the heir; but as to the personal estate, if the executor, though made before the acquiring thereof, does not take it, it is uncertain who shall.

A devise of a chattel interest differs from a grant of a chattel interest, in that the grantee is in immediately by the grant; but such devisee is not until the assent of the executor

Thirdly, A *devise* of a chattel-interest differs from a *grant* thereof, such devise vesting nothing in the devisee until the executor assents; from whence it follows, that the executor (*a*) is a trustee for the legatee, with respect to his legacy, and this is the only reason why the legatee may bring his † bill in equity * against the executor for his legacy, supposing it to be a trust.

(*a*) Farrington v. Knightly, 544.

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Then if the devise be good by way of trust, suppose the testator who was devisee in remainder of this term in the present case, had declared his executor to be but a trustee *quoad* the term for *J. S.* had not this been good? Doubtless it had, and it is as strong when the testator does (as here) devise this remainder or possibility to *J. S.* for the same amounts to a direction made by the testator, that when such remainder of the term shall come *in esse* by the death of *A.* then his executor is to convey it to *J. S.* and as this would have been good, so the bequest of the remainder is tantamount, every legacy being a direction to the executor to deliver it over. The office of the executor is to pursue and perform the testator's will and direction; and this is his direction.

Or suppose *B.* the devisee in remainder of this term, had covenanted that when the remainder should take effect in possession, he, or his executors, would convey, this had been good, and the covenantor, after such covenant, had been but a trustee for the covenantee. Now why cannot this trust be as well declared by a *will* as by a *deed?*

Or if the remainder-man in the present case had made *J. S.* his residuary legatee, and *J. M.* his executor in trust, should not the residuary legatee have had the benefit of this possibility of the term? Surely he should, and not the executor, who would be but a bare trustee; and therefore, (as has been

† As also why the spiritual court cannot decree a distribution of the undisposed surplus. Vide *Ibid.*

rightly put at the bar) if the case had been, that *B.* the devisee in remainder, had by his will given the remainder of this term to *J. S.* and made *J. M.* executor *quoad* the term, this had been plainly good; for it is the intent and not the form of the will which is to be regarded.

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By the same reason then that if the testator had made *J. M.* his executor, *quoad* the term, in trust for *J. S.* it had been good, even so when the administrator claims that this legacy may be granted to him as administrator *de bonis non*, with the will annexed of *B.* he must be a trustee *quoad* this remainder of the term when it falls into possession, for the devisee; and as a consequence of it, I decree that the administrator *de bonis non*, *&c.* of *B.* do assign over the term to the devisee of *J. S.* to whom *B.* devised it. (1)

(1) Reg. Lib. B. 1718. fol. 501.

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CASE 168.

LORD CHANCELLOR PARKER.

KATHERINE *Naldred* seised in fee of lands of about 60*l per annum* had a nephew named *George Naldred* (the plaintiff) and another nephew called *Richard Gilham* (the defendant). The plaintiff *Naldred* was about three or four years old, and *Katherine* the aunt, by indenture of covenant to stand seised, dated the 26th of *February* 1707, settled the premisses on herself for life, remainder to her nephew *Naldred* in fee, without any power of revocation; but though the aunt bespoke two parts thereof, yet she kept both in her own possession.

Vide 2 Vern. 473. Clavering v. Clavering. 2 Eq. Ca. Ab. 52. pl. 7. *A.* makes a voluntary settlement on her nephew, keeping the deed in her power, in which settlement there is no power of revocation; afterwards one secretly and by fraud, on behalf of the nephew, gets an attested copy of this settlement; and then the party who made the settlement burns it, and settles the premisses on another nephew. The first nephew's bill to establish the copy of the first settlement is dismissed with costs. Upon which the second nephew, claiming under his settlement, brings a bill to have the attested copy delivered up, and has a decree for it; because such copy had been indirectly gained.

Afterwards Mrs. *Naldred* being minded to settle the premisses on her nephew the defendant *Gilham*, instead of her nephew the plaintiff *Naldred*, and advising with some lawyer about it, was told she had put it out of her power, by having settled the premisses absolutely on the plaintiff; whereupon she expressed great concern, saying she had been imposed upon. She afterwards burnt both these parts of the settlement by which she had settled the premisses on the plaintiff *Naldred*, and by lease and release dated the 23d and 24th of

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October 1713, made a new settlement of the premisses to the use of herself for life, remainder to the use of her nephew the defendant *Gilham* and his heirs, and having delivered this last settlement into the defendant *Gilham*'s hands, she soon afterwards died.

The plaintiff's father had, in the life of *Katherine Naldred* the aunt, (who for several years lodged and boarded at his house) when she was about leaving him, and he under some apprehensions that she would alter the settlement, by stealth and without the privity of the aunt, got at this first settlement by which the plaintiff claimed, and having procured an attested copy of it, put up the two parts where they were before placed by the aunt, which she burnt as aforesaid.

After the aunt's death, the plaintiff *Naldred* the infant, by his father his next friend, brought a bill to establish this attested copy against the defendant *Gilham*, insisting that both the settlements were voluntary, and therefore according to the rule in such cases, the plaintiff's being the first voluntary settlement (*a*) ought to prevail; and coming on before the *Master of the Rolls*, his Honour with great clearness determined for the plaintiff and granted a perpetual injunction against the defendant, decreeing the deeds to be delivered up, and likewise condemning the defendant in costs.

(*a*) Vide ante, Young v. Cottle, 102.

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But upon an appeal to Lord Chancellor *Parker*, his Lordship after time taken to consider it, and several adjournments of the cause, reversed the decree at the Rolls, declaring that it was plain the aunt intended to keep this estate (1) in her power; that she designed there should be a power of revocation in the settlement; and that she thought whilst she had the deed in her custody she had also the estate at her command; all which in this case appeared more evidently from the settlement being made by her on so tender an infant, whose future conduct it was impossible for her to foresee, and that when she was told, that by having made the settlement

(1) Vide *Ward* v. *Lant*, Pre. Cha. 182. *Clavering* v. *Clavering*, 2 Vern. 473. and 1 Bro. P. C. 122. S. C. *Cotton* v. *King*, post. Vol. II. 359. *Boughton* v. *Boughton*, 1 Atk. 625. (*z*)

(*z*) *Colman* v. *Sarell*, 3 Bro. C.C. 12. 1 Ves. jun. 50. *Sear* v. *Ashwell*, *Bolton* v. *Bolton*, 3 Swan. 411, 414. *Antrobus* v. *Smith*, 12 Ves. 39. *Ellison* v. *Ellison*, 6 Ves. 656. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84. *Cecil* v. *Butcher*, 2 J. & W. 565.

absolute, she had disabled herself from settling the estate a second time, she immediately expressed great surprise, and complained she had been imposed upon; that in fact she appeared to *have been* imposed upon, by preparing and making the conveyance absolute; which it had been unreasonable in any one to have asked of her. That taking her to have been imposed upon in the making this settlement an absolute one, when it ought to have been with a power of revocation, he did not see she did amiss in burning or destroying it, as this was but doing herself right, and if in her life-time the now plaintiff had brought a bill against her, in order to have the first settlement set up, there ought not to have been any relief upon such a bill.

That it was manifest the aunt did no way intend to be bound by this settlement, because though there were two parts of it, yet she would not deliver either of them to the plaintiff or his friends, whereas she parted with the second settlement to her nephew the defendant *Gilham*, which shewed her intention to be bound thereby; and that as nothing could be more evident than that this attested copy was procured clandestinely, indirectly, and without her privity or consent, no advantage ought to be made of a writing gained in such a manner. That this attested copy, if any evidence of the first settlement (as it seemed to the court to be, when the person who made the original had burnt it, and stronger than the case, where the party had the original and would not produce it) being intended to be made use of at law, the plaintiff did wrong in coming here with a title which (if any) was a legal one, at least a copy so indirectly gained ought not to be assisted or countenanced in equity; and since the defendant stood exposed to be disturbed at law in the title, had been to no purpose put to great charge in this court, and since the mother who was *prochein amy* in the father's room, though she came late into the cause, yet when once made *prochein amy*, stood in the place of the father who was first so, and liable to pay all the costs as he was before; and as it was said (and not denied) that she had great assets from her husband the testator, therefore, in order to make the defendant reparation for the needless trouble and expence he had been put to here, his Lordship decreed the bill to be dismist with costs, unless the plaintiff's mother and *prochein amy* should within three weeks deliver up the attested copy of the first settlement, and also give to the defendant the possession of the estate within the same time.

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Afterwards the defendant *Gilham* brought a bill against

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Naldred the mother and *Naldred* the son, to have this attested copy of the first deed of settlement delivered up; and coming on to be heard the 10th of *February* 1720, *Lord Chancellor* declared that the said first deed of settlement of the 26th *February* 1707, ought not to prevail against the latter of 1713, for that though the first settlement was sealed and delivered, yet it was not delivered out of her power; but the said *Katherine Naldred* kept both parts thereof in her own custody, that she might destroy them, if she thought fit; and *George Naldred* the father of the infant getting a copy of such settlement fraudulently, and by a trick, ought not thereby to establish it against the latter settlement; and though regularly the first voluntary settlement ought to prevail against the latter, yet if the first be gained by fraud (and the sole evidence of this settlement was so) it ought not to prevail against a second settlement, though voluntary. And notwithstanding it was evident *Katherine Naldred* the aunt did once intend the premisses should go to her nephew *Naldred* the infant: yet it was never her design to put it out of her power to alter or vacate the settlement she had made.

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Of two voluntary settlements, if the first be made absolute against the intention of the party, the second shall prevail.

Wherefore it was decreed, that the copy of the first settlement which *Joan Naldred* the mother confessed by her answer to be in her custody, should be brought before the Master, to remain in his hands till further order of the court, and that the defendant *Joan* the mother should be examined upon oath, as to any other copy of the said deed, and if there had been any other copy made thereof, that was also to be delivered up, and the defendant *Joan* to account for the rents and profits of the premisses received by her or her late husband, since the death of *Katherine Naldred* the aunt, who made the settlement, and the tenants of the premisses were to attorn to the plaintiff *Gilham*, and this to be binding to the defendant *George Naldred* the infant, unless he should shew cause within six months after he came of age; but no costs on either side, unless the defendant should put the plaintiff *Gilham* to further trouble, and then the plaintiff *Gilham* was to apply to the court for his costs.

His Grace the DUKE of QUEENSBERRY and DOVER'S Case. (In Domo Procerum.)

Case 16

THE late Queen *Anne*, by letters patent dated the 26th of *May*, in the seventh year of her reign, created *James* then Duke of *Queensberry* (the present Duke's father) Baron of *Rippon*, Marquis of *Beverley*, and Duke of *Dover*, to hold these titles and dignities to him for life, and afterwards to his second son *Charles* (the present Duke) then Earl of *Solloway* in *Scotland*, and the heirs male of his body, remainder to the third son *George Douglas* and the heirs male of his body, remainder to the fourth son, &c. in tail male successively, the eldest son of the late Duke being an ideot, and therefore passed by in the patent.

2 Eq. Ca. Ab. 707. pl. 1. Since the union a Scotch Peer, made an English Peer, cannot by virtue thereof sit and vote in Parliament.

In pursuance of this patent, a writ issued to summon the late Duke to parliament, who was accordingly on the 19th of *November* 1708 introduced into the House of Lords, where he took his seat, and continued to sit and vote in two successive parliaments, no objection being made to such his right at any time during his life.

The late Duke died during the infancy of the present Duke, who coming to age petitioned the King to cause a writ of summons to be issued to him for his coming and voting in Parliament.

And on the 18th of *December* 1719, His Majesty referred i to the House of Peers, to take the petitioner's claim and righ into consideration, and to do and determine thereupon what should be found just and right.

Upon this the House of Peers gave leave that the present Duke of *Queensberry* should be heard at the bar of the House by his counsel. [583]

And the difficulty was, that in the late Duke of (*a*) *Hamilton*'s case it was resolved by the Lords, "that no patent of "honour granted to any Peer of *Great Britain* who was a "peer of *Scotland* at the time of the union," should intitle him to sit in Parliament.

(*a*) Die Jovis, 20 Decembris, 1711.

This resolution was founded on the construction of the articles of (*b*) union of the two kingdoms of *England* and *Scotland*, after which union the patent of the dukedom of *Dover* was granted to the Duke of *Queensberry* in manner above mentioned.

(*b*) 5 Annæ, cap. 5.

The articles of union affecting this case were the 4th, 22d and 23d.

DUKE OF QUEENSBERRY'S CASE.

By the 4th article it is enacted, "that from the time of the "union there shall be a communication of all rights and privi- "leges belonging to each kingdom, except where it is other- "wise expressly agreed by the articles."

By the 22d it is agreed, "that by virtue of the treaty of "Union, sixteen shall be the number of the Peers of *Scotland* "to sit and vote in Parliament," and there the method of chusing these sixteen Peers is prescribed.

By the 23d article it is agreed, "that these sixteen Peers "thus elected shall have all the privileges of the Peers of Par-
[584] "liament of *Great Britain*. Also that all the rest of the Peers "of *Scotland* shall have all the privileges of the peerage of *Eng-* "*land*, excepting only that of sitting and voting in Parlia- "ment."

And it was urged in favour of the petitioner, that in these articles it was difficult to find out words which could be thought to disable the King from granting to a *Scotch* Peer a patent of peerage of *Great Britain* with the privilege of sitting in parliament, or which disabled a *Scotch* Peer from accepting such a patent. Especially, when the rule of law was, (and it was a rule without exception) that the prerogative of the King, of which the law was so regardful, could not be taken away by any act of Parliament without plain and express words; more especially so valuable a part of the prerogative whereby the Crown was enabled to encourage the merit of the subjects, by bestowing on them honours and titles.

The words of the articles seemed so far from importing any such disability, that there was not so much as a negative in any of the articles: there was indeed what seemed to be the reverse of this construction, the *fourth article* saying, "there "shall be a communication of all rights and privileges between "the subjects of either kingdom, except where it is otherwise "expressly agreed by the articles." And there was nothing expressed to the contrary in any of the articles.

So that the subjects of each kingdom, without any preference, disadvantage or discouragement, were to be equally capable of the sovereign's favour; and surely the *Scotch* Peers were subjects as well as others, and it was the intention of these articles to encourage the subjects to do their best service to their sovereign.

[585] It was admitted that by the treaty of union, only sixteen were to represent the Peers of *Scotland:* but though in virtue thereof, only sixteen Peers were to be *elected,* yet this did

not hinder, but that by letters patent more Peers might be created.

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It was submitted to their Lordships, whether it could be intended by the above-mentioned articles of union, that those *Scotch* Peers should be in a worse condition than the meanest of their fellow subjects; nay than the meanest of their own servants; in a worse condition than those who are no subjects, but *aliens;* nay worse than criminals; since by such construction of the articles as would disable Peers of *Scotland* from sitting here by letters patent, all those things before mentioned were implied; for,

It was in the power of the King (if it was his pleasure so to do) to make a servant of a *Scotch* Peer a Peer of *Great Britain;* and then it was pretty strange that the King should not be able to make the Master so. It was in the power of the King, for such merits as he alone was judge of, to bestow honours upon the meanest of his subjects. It was in his power to make an alien born, first a denizen and then a nobleman. It was the Crown's prerogative to pardon a criminal: and if it were the royal pleasure, and such criminal should have done service to the Crown (of which the Crown alone was to judge) such criminal might be made a peer.

And it seemed harsh to say, that a nobleman of *Scotland,* by all the services of his life, could not make himself capable of becoming a peer of *Great Britain,* and of voting in Parliament by virtue of a patent; but that if he were to commit treason, and to be attainted, by which he would forfeit his *Scotch* peerage, and then were to be pardoned; from the time of such pardon he would be capable of being a Peer of *Great Britain,* with the full privilege of sitting in parliament.

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But whatever constructions these things might receive, the principal case was out of the articles of union, and (probably) a different case from that of any other Peer of *Great Britain.* The present Duke of *Dover* not taking this Dukedom as heir to his father by descent, but by virtue of a remainder limited thereof to him as the second son of his father, The late Duke of *Queensberry.*

That it must be admitted, the patent of Dukedom was limited in remainder to the second son, by his then title of Earl of *Solloway;* and the pretended disability against his having the privilege of sitting in this house as an *English* peer, and as Duke of *Dover* was, that at the time of the union he was a *Scotch* peer, (viz.) Earl of *Solloway.*

DUKE OF QUEENSBERRY'S CASE.

Whether a peerage granted to an infant may be waived by him when he comes of age.

Now the honour of the Earldom of *Solloway* was granted to him when an infant; and it was said to be a rule of law, that in case of an infant, a grant made to him during his infancy might be waived and disclaimed by him when he came of age. And the known diversity was, that what came to an infant by descent (which was the gift of law) that he could not waive; but whatever came to the infant by the gift or grant of another, might be relinquished by him when of age.

Also it was said to be plain, that whatever an infant did waive or refuse when of age, it then became the same thing as if the grant had never been made to him. Thus an infant
[587] when of age might refuse any estate given to him during his infancy; and the reason of the law was, for that it might be more for the infant's benefit to be without the estate or grant, (which proved to be this very case) and no acceptance of an infant should bind him.

That for the same reason if a common person (and it holds as strongly, if the King) should make a lease for years, or grant lands in fee to an infant, he when of age, might waive and refuse it; since the rent reserved might be more than the value, the estate might be more incumbered than it was worth.

Now a grant of peerage was within the same rule of law in this and other respects as a grant of land: a dignity or barony was intailable within the words [lands and tenements] and comprised therein. 1 Inst. 20. Again, a dignity or barony, though intailed, was comprised within the statute of 26 H. 8. cap. 17. by the words [lands, tenements and hereditaments;] and therefore was, though intailed, forfeitable for treason (*z*), and generally speaking, dignities and honours were governed by the same rules of law, as lands, some few instances only, for particular reasons excepted.

Consequently, as an infant when of age might refuse or waive a grant made to him of lands, so might he refuse a grant of an honour made to him during his infancy, and exactly for the same reason; for an honour might be loaded with an incumbrance as well as land; and in the principal case (as some would have it) the *Scotch* peerage from the time of the union was in fact clogged and loaded with a great incumbrance, such an incumbrance as was a perpetual disability to the peer and his issue in all succeeding generations from sitting in this house.

(*z*) 2 Eden, Append. 373.

Wherefore it was plainly for the benefit of his grace the Duke of *Dover* (who had two honours granted him during his infancy, one of which, the *Scotch* peerage, was inconsistent with the *English* one, and thought to disable the Duke from sitting in this house) to waive and refuse such *Scotch* peerage granted him during his infancy, and by accepting of the dukedom of *Dover*, to elect to serve the sovereign in that capacity which seemed to take in all that was implied in the other, and more.

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It must indeed be admitted that the King was intitled to the service of his subject in what capacity he pleased ; but an infant could not vote in this house, during his minority ; and now upon the Duke's first attaining his age, as the Crown had elected that he should serve as an *English* Peer and Duke of *Dover*, he was ready to do so, not having been able to sit in this house before, or when an infant.

The counsel further observed, it would hardly be expected from them, that they should shew a precedent where an infant when of age had waived an honour granted to him during his infancy ; it not having been usual (unless in the Royal Family) for the Crown to bestow honours upon infants.

That in the old books there were several instances of noblemens resigning and surrendering their honours (*a*), though accepted by them after their coming to age, and though descended to them : But in the principal case they did not go so far ; they only held that an honour granted to an infant might be waived by him when of age. That this being agreeable to the known rules of law in relation to estates granted to infants, it seemed incumbent on the other side who opposed the Duke's sitting in the House, to produce precedents, shewing that an infant could not waive an honour as well as land granted to him during his infancy.

(*a*) See Cases in Parliament, Lord Purbeck's Case.

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However they should cite one case, that of Lord *Abergavenny*, 12 Co. 70. Where *Edward Nevil* in the second and third of Queen *Mary* was called by writ to Parliament by the title of Lord *Abergavenny*, and dying before the Parliament met, it was resolved 8 Jac 1. by the Lord Chancellor, the two Chief Justices, Chief Baron and divers other judges then present in the House of Peers, that Lord *Abergavenny*, was no Baron ; because by the King's command the writ might be superseded or countermanded, or the party *might excuse himself to the King, or might have waived it and submitted himself to a fine* ; as where one is distrained to be a knight, or one learned in the law is called to be a serjeant ; the issuing of

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the writ alone cannot make the one a knight, or the other a serjeant, since either may excuse himself, or submit to a fine, or die before the return of the writ. So that from this case it was said to appear that the party, *though of age*, might refuse being made a peer; and if so, much more when an infant. And taking it that such grant of an honour made to an infant might be waived, it then must plainly relate to the time of making the grant, and not to the time of the waiver only; as if a lease for years be made to an infant, rendering rent, and the infant when of age waives it, this plainly discharges him of all the arrears of rent; whereas if the estate were devested only from the time of the waiver, then the infant when of age must pay the rent till the time of the waiver, which was plainly otherwise.

[590] Wherefore as the waiver of the honour related to the time of making the grant, it followed that the Duke of *Queensberry* and *Dover*, as soon as he came to age, having waived the grant of the *Scotch* peerage, his *Grace* was upon the matter never Earl of *Solloway*, and so not a *Scotch* Peer at the time of the union; consequently he was capable of being made an *English* Peer, and not in any sense within the resolution of the Duke of *Hamilton*'s case.

But suppose the determination should be against the present Duke's claim, yet if he should happen to die without issue male, his younger brother *George* would plainly be intitled; for the dukedom of *Dover* being limited by the same patent after the death of the late Duke of *Queensberry*, to his second and third sons successively in tail male, they both took their dukedom by purchase and not by descent; and consequently if the present Duke, the second son, should die without issue male, the third son *George*, who was not a Scotch Peer at the time of the union, would be plainly intitled to the dukedom of *Dover*, with the privilege of sitting in this house. And it seemed pretty strange to say that the elder brother should not have such privilege, but that all his younger brothers should; especially when all the brothers claimed under the same patent of honour.

Much more was said to distinguish this case from the resolution in that of the Duke of *Hamilton;* and it was urged that there was no more reason, the resolution in the Duke of *Hamilton*'s case should preclude them from speaking against it, than that the resolution in favour of a Peer, the late Duke of

[591] *Queensberry* should preclude any from controverting that. But that rather a resolution in favour of a Peer, and allowing

him to sit and vote in Parliament, was stronger and more to be regarded than a resolution to the contrary; since the noble peer, who by virtue of any resolution came into this house, might possibly by his votes and debates occasion several resolutions which otherwise might not have been; and if it should be afterwards determined that such peer had no vote, the suitor whose cause was lost by the vote or debate of such Peer, must think himself very unfortunate. But on any resolution of the house against the admitting a Peer to sit and vote, that terminated only in himself, and affected no third person, as the other case would; so that this resolution in favour of the Duke of *Queensberry*'s patent, and admitting him to sit and vote, though it were only one single resolution, would still be stronger than the resolution in the Duke of *Hamilton*'s case.

Upon the whole matter: as the patent under which the present Duke of *Queensberry* and *Dover* claimed a right to sit in this house had been allowed in his father's time: as his father to the time of his death, in two successive Parliaments did sit and vote here, and no objection could be made to the present Duke's claim, but what might likewise have been made against that of his father: so it was hoped the house would be of the same opinion, as to the sons sitting among them, as their Lordships had been of in the case of his father, it being upon the same patent. And as his Grace succeeded his father in his honour, so their Lordships would admit his Grace to succeed his father in the seat in that house, which was belonging to the honour.

But upon the debate of the question, the majority of the Peers were against allowing the present Duke the privilege of sitting in their house. (1)

The Lord *Cowper* was of opinion that the King could not [592] create a subject a peer of the realm against his will; because then it might be in the power of the King to ruin any subject whose estate and circumstances might not be sufficient for the honour.

The Lord *Trevor contra:* that the King had a right to the service of his subjects in any station he thought proper, and instanced in the case of the Crown's having power to

(1) However in 1782, the Duke of *Hamilton* was allowed to take his seat in the House of Peers as Duke of *Brandon*. The dukedom of *Dover* became extinct by the death of the late Duke of *Queensberry*.

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compel a subject to be a sheriff, and to fine him for refusing to serve.

Also the Lord *Cowper* held that a minor might waive when of age a peerage granted to him during his infancy; especially in this case, it being a *Scotch* peerage and amounting to no more than a grant of a disability. But,

The Lord *Trevor* observed, that in Lord *Abergavenny's* case it was admitted the King might fine a person whom his Majesty thought fit to summon by writ to the House of Peers, it being said there, that a person might chuse to submit to a fine: and if it were allowed the King might fine one for not accepting the honour, and not appearing upon the writ, the King might fine *toties quoties*, where there was a refusal, and consequently might compel the subject to accept of the honour.

And that it was not to be presumed the King would grant a peerage to any one to his prejudice or wrong, any more than that he would make an ill use of his power of pardoning; all which are suppositions (*a*) contrary to the principles upon which our constitution is framed, which depends upon the honour and justice of the Crown.

(*a*) See Lord Keeper Sommers's argument in the banker's case, page 127.

In this case I was of counsel with the Duke of Queensberry, *&c.*

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CASE 170.

FAWKES *versus* PRATT.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 1. pl. 3. 723. pl. 1.

They only are defendants to a bill, against whom process is prayed. (*z*)

THE plaintiff was a bankrupt, and brought a bill against his supposed debtor the defendant *Pratt*, to compel him to account.

The defendant pleaded that the plaintiff being a bankrupt, and found so by the commisioners, his effects were assigned to *A.* and *B.* for the benefit of the creditors, and that the said assignees ought to be made parties.

Upon this the plaintiff having an order for that purpose, amended his bill, and in the body thereof charged the assignees in a proper manner; but the prayer of process was (as before) only against the defendant *Pratt*. After which the defendant put in the same plea to the bill, (*viz.*) that the assignees ought to be made defendants.

Lord Chancellor: The plaintiff may complain and tell stories

(*z*) *Windsor* v. *Windsor*, 2 Dick.707.

of whom he pleases; but they only are defendants against whom process is prayed, and no process being prayed against the assignees, they still are not defendants, consequently the plea is good.

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But the solicitor (who was in court) pretending that the record was right, which appeared afterwards not to be so, and the plaintiff being a poor man and in prison, and this seeming to be the gross neglect of the solicitor, the plea was allowed and the bill thereupon amended; but the costs were ordered to be paid by the solicitor.

Upon the attorney's or solicitor's appearing to be guilty of a gross neglect, the court will order him to pay the costs. (y)

(y) *Lloyd* v. *Nangle*, 1 Dick. 129. *Cook* v. *Broomhead*, 16 Ves. 133. *Wright* v. *Castle*, 3 Mer. 12. *Wilson* v. *Wilson*, 1 J. & W. 457. *Brassington* v. *Brassington*, 1 S. & S. 455.

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CASE 171.

BOWERS *versus* LITTLEWOOD.

ONE died intestate, leaving no wife or child, brother or sister; but his next of kin were an uncle by his mother's side, and a deceased aunt's child.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 439. pl. 37. One dies intestate, leaving an uncle and a deceased aunt's son; the latter shall have no share under the statute of distribution. (z)

The latter brought a bill against the uncle for a share of the intestate's estate; to which bill the defendant demurred.

For the plaintiff it was insisted that upon the reading the statute of 22 & 23 Car. 2. cap. 10. which says, "that where "the intestate leaves no wife or child, the personal estate "shall go to the next of kin, and their legal representatives; "provided there shall be no representation amongst collaterals, "after brothers' and sisters' children," Lord *Cowper* had inclined to think that *brothers' and sisters' children* should refer to the word [collaterals] so that the child of any collateral brother should take by representation with the uncle or aunt of such child: and it was said that this was called a statute of *distribution*, as intended to be diffusive in distributing the intestate's effects, to prevent any single hand from sweeping away the whole personal estate; and to dispose of it so as that all the near relations of the intestate might be provided for, by which construction the statute would do the most good;

(z) *Beeton* v. *Darkin*, 2 Vern. 168. *Maw* v. *Harding*, ib. 233. *Evelyn* v. *Evelyn*, Amb. 191.

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that it would be hard the intestate's uncle's son by the father's side who bears the name, should be quite excluded by an aunt of the mother's side, married (it may be) to a stranger; that as to *Pett*'s case (*a*) where the intestate left a deceased brother's child, and a deceased brother's grandchild, upon which it was adjudged that the grandchild (the intestate's grand nephew) should not take, this might be admitted; because the proviso says, "there shall be no representation among "collaterals after brothers' and sisters' children," and there was a grandchild of a brother, who by the express words was excluded.

(*a*) Ante, 28.

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Lord Chancellor: In *Pett*'s case, the grandchild was nephew to the person with whom he claimed to come in for a share, but yet the latter took the whole. Wherefore that is a case in point; and indeed I apprehended this matter to have been settled, and that the practice in the spiritual court had been conformable thereto. What has been urged with regard to the hardship of the case is nothing; for so it may seem hard that if an intestate leaves a deceased brother's only son, and ten children of a deceased half-sister, the ten children of the deceased half-sister shall take ten parts in eleven with the son of the deceased brother; and yet the law is so, because they all take *per capita*, and not by way of representation.

See the case of Walsh v. Walsh, Pre. Cha. 54. determined, as it is there said, by Lord Sommers on great deliberation.

Wherefore the Court allowed the demurrer.

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LORD CHANCELLOR PARKER.

THE *plaintiffs* moved to examine some of the co-plaintiffs, saving just exceptions; and the *defendant* made the like motion.

The court cannot make an order to examine a plaintiff de bene esse, saving just exceptions, though they will make such order to examine a defendant; but the defendant ought to have demurred to such immaterial plaintiff. If a corporation would make use of one of their own members as a witness, they must disfranchise him.

Lord Chancellor: If a corporation will examine any of their members as witnesses, they must (and so is the course) disfranchise them, and then they make use of their testimony; but upon his Lordship's consulting with the register, it appeared to be a rule, that no co-plaintiff ought to be examined as a witness on behalf of the plaintiff; there being this apparent exception against him, (*viz.*) his being liable to answer costs, if the event of the cause should prove against him.

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But by *Lord Chancellor*, there is more reason that the de-

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fendant should be at liberty to examine one of the plaintiffs in this cause. *First*, because the defendant cannot disfranchise any of the corporation, as the plaintiff may. *Secondly*, if the plaintiff swears any thing against himself, it is good evidence *against* him, though nothing that he swears can be evidence for him.

Nevertheless the practice is otherwise; and this seems to be in imitation of the common law, where the defendant cannot examine the plaintiff; and though equity goes so far as to give either side leave to examine a *defendant de bene esse*, yet this rule has not been extended to a *plaintiff*, who if he be an immaterial plaintiff, the defendant may demur. (1)

Note; The method of disfranchising is by an information in nature of a *quo warranto* against the member, who confesses the information, on which the plaintiff obtains judgment to disfranchise.

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(1) But in *Armiter* v. *Swanton*, Amb. 393. a trustee plaintiff was permitted to be examined on the part of a defendant. And in *Troughton* v. *Getley*, 12 May 1766, Lord *Northington* made an order, that the defendant should be at liberty to examine the plaintiff *Green*, (who was co-assignee with *Troughton* of a bankrupt) as a witness for the defendant. Reg. Lib. B. 1765. fol. 254. (*z*)

(*z*) See however 1 Dick. 382. and *Hewatson* v. *Tookey*, 2 Dick. 799. in which the decision in *Troughton* v. *Getley*, was overruled by Lord *Thurlow*. But a defendant may obtain an order for examination of the plaintiff, if the latter consents, *Walker* v. *Wingfield*, 15 Ves. 178. And see *Motteux* v. *Mackreth*, 1 Ves. jun. 142. *Lloyd* v. *Makeam*, 6 Ves. 145. *Witts* v. *Campbell*, 12 Ves. 493.

DE TERM. S. HILLARII, 1719. [597]

1 Young & C. 295

ALL SOULS COLLEGE *versus* CODDRINGTON, *et è contra*. CASE 173.

At the Rolls.

COLONEL *Coddrington* devised to *All Souls College* in *Oxford* in these words, *I devise my library of books now in* *A.* devises his library of books now in the custody of *B.* to a college, and afterwards buys more books, which he places in the same library, and gives 4000*l.* more to increase their library; the after-bought books shall pass.

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the custody of Mr. Carswell, *to* All Souls College *in* Oxford; and in the same will he devised to the said college 4000*l.* more to augment their library. After which the testator bought several books of value which were placed in the said library.

Objected, That the books purchased afterwards should not pass; because the gift is of his library of books *now* in the custody of *Carswell*, which word [now] must be relative to the time of making the will, otherwise must be rejected; but it was said to be against an established rule in the construction of wills, to reject any word that can be made to take effect; it was admitted that without the word [now] the will, as to the personal estate, would relate to the time of the death of the testator; *secus* where that word was inserted; that if I should devise all the leases (*z*) which I now have, or all the horses which I now have in my stable, and afterwards purchase more of each, these new leases or horses would not pass.

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Master of the Rolls: Where I devise all the corn *now* in my barn, if that corn be afterwards spent, and new corn put in, such new corn will not (*a*) pass: But if I devise all my flock of sheep *now on such a hill, or in such a pasture;* in that case, because sheep are in their nature fluctuating, some must die, some be killed, and some lambs be produced which will afterwards breed, and it being the case of a collective body, the sheep produced afterwards shall pass; and this is within the reason of a devise of a personal estate, which, because always fluctuating, shall therefore relate to the time of the testator's death; besides the will, as to personals, does not speak till after the testator's death.

(*a*) Vide autem Swinb. 448. contra.

Vide ante, 424. Masters v. Masters, and Wind v. Jekyl and Albone, 575.

It is natural to think that the testator did not in the principal case intend his executor should be garbling the library after his death, by picking out the books bought since the making the will, which appears more plainly from the subsequent devise of 4000*l.* to the college to buy books, so that his design manifestly was to *increase* rather than *diminish*.

As to the cases that have been put of a devise of all the leases which I now have, or of all the horses now in my stable, and afterwards I purchase more of each, the new leases or horses will not pass; the reason is, because these are particular chattels, and not part of a collective body as a flock of sheep, or library of books. Indeed a flock of sheep differs somewhat from a library of books; for the former must of necessity fluc-

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(*z*) See *Abney* v. *Miller*, 2 Atk. 593. *James* v. *Dean*, 11 Ves. 383, 15 Ves. 236.

tuate as above; but there is no necessity that books should be changed.

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However in this case it was decreed, that the books afterwards bought by the testator, and put into this library, should pass to the college by the will; the court being of opinion that the word *now* did not relate to the books which were in the library at the time of making the will, but, on construction of the whole sentence, denoted where the said library was, and might be intended to distinguish it from any other library of the testator's. (1)

(1) Dean of *Christchurch* v. *Barrow*, Amb. 641. (*z*)

(*z*) *Gayre* v. *Gayre*, 2 Vern. 538. 1 Eq. Ca. Ab. 201. pl. 12. and *Masters* v. *Masters*, ante 424. And see *Attorney General* v. *Bury*,

ATTORNEY GENERAL *versus* WYBURGH *et al'*. (*z*)

Case 174.

Lord Chancellor Parker.

2 Eq. Ca. Ab. 167. pl. 11. In a suit on behalf of a charity, for the arrears of a rent-charge, not necessary to make all the terre-tenants of the land out of which the rent issues, parties.

ONE charges all his lands in *Chigwell* in *Essex*, and in *Enfield* in *Middlesex* with 20*l. per annum* to the poor of *Enfield*. And an information being brought to make diverse lands in *Enfield* liable to the charity, leaving out the *Chigwell* lands, it was objected, that the *Chigwell* lands ought to contribute, and the owners thereof be made parties.

Lord Chancellor: This is in nature of a plea in abatement,

(*z*) The testator devised his lands in 1631, charged with 20*l. per annum* to the poor of *Enfield*. The heir of the devisee had leased part of the property, reserving a rent of 20*l.* 6*s.* 8*d.* to the minister and churchwardens of *Enfield*, as a fund to satisfy the charity, but the tenant having left the premisses, they remained for some time unoccupied. By the decree it was "referred to Mr. "*Lovibond* to take an account and see "what is due for the arrears of the said "rent-charge of 20*l. per annum*, and "what lands have been set apart for "payment of the said rent-charge, and "what is the value of such lands, and "which of the lands have contributed "towards the payment of the said 20*l.* "*per annum*, or to the repairs of the "premises set apart for payment thereof. "And the said master is also to enquire "what other lands there are that are "liable to the payment of the said rent-"charge, and in whose possession such "lands are, and what is the value of the "said lands." Reg. Lib. A. 1719. fol. 267. And see *Attorney General* v. *Shelly*, 1 Salk. 163. *Attorney General* v. *Jackson*, 11 Ves. 365.

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and unless it be insisted on in the answer, and the particular owners shewn, I will put the owners of the *Enfield* lands to take the labouring oar on themselves to find out the *Chigwell* lands, and bring their bill for that purpose if they think fit; for at this distance of time, (the charitable gift being in 1651) the lands may be lost, or not distinguishable, or purchased without notice; and if the charity has lost the *Chigwell* lands, it would be strange to make use of this as a reason, why it should lose the *Enfield* lands likewise.

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Parishioners no good evidence to prove a charity given to the parish. (*z*) *Secus* if only a lodger, and one that does not pay to the poor. But to be intended a house-keeper, and to pay, &c. unless the contrary be made appear.

Also part of this charity being given for the cloathing of six poor persons of the parish of *Enfield*, *Lord Chancellor* would not suffer any of the inhabitants of *Enfield* to be witnesses, because they were interested, as being eased in the poor rates; and though it was urged, that they might be lodgers there, or persons not contributing to the rate, and that it was incumbent on those who took the exception, to make out the contrary;

Tamen per Cur': The witness being described to be of the parish of *Enfield*, yeoman, must be intended an house-keeper, and one liable to pay parish rates, unless the contrary be made to appear.

Wherefore it was sent to the Master to inquire whether the lands were liable to the charity.

(*z*) *Dowdeswell* v. *Nott*, 2 Vern. 317.

14. Jur. 776.
2. Russ & Myl. 394.
3. Myl & Cr. 140.
2 Kel. 772. CASE 175.
3. Bea. 195.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 182. pl. 2. 313. pl. 20. 324. pl. 27. 660. pl. 5. 702. pl. 4.

1712.

BLACKBORN *versus* HEWER EDGLEY, *et è contra*. (1)

MR. *Hewer*, late of *Clapham*, being a single man, and having a vast real and personal estate, and a near relation, *Anne* the wife of *Samuel Edgley*, for whom and whose issue he intended the bulk of his estate; by will, dated the 9th of *September* 1715, after having declared his intention that his name and family should be continued by some of the children of his cousin *Anne Edgley*, directs that his manner of housekeeping at his dwelling-house at *Clapham* should be continued for one year after his death, as also his servants at the old salary, and that 1200*l.* *per annum* should be allowed his cousin *Anne Edgley*, for that purpose; and after the expiration

(1) Reg. Lib. A. 1719. fol. 445.

of that year his cousin *Anne Edgley* should continue to live at his house at *Clapham*, and that her son *Hewer Edgley* should cohabit with her there, in the same manner as he then did with the testator; that the said *Anne Edgley* should be at all the charge of house-keeping, servants' wages and coach-horses to the number that he maintained; and to enable her so to do, he directed that 1200*l. per annum* should be paid to her by quarterly payments for her life; and that in case her son *Hewer Edgley* should marry, and his mother the said *Anne Edgley* should think fit to live from him, and to quit the house and furniture, then she to have 250*l. per annum* for life; and he devised all his freehold estate, and also the residue of his personal estate to trustees, their heirs, executors and administrators, in trust to convey all his freehold estate to the said *Hewer Edgley* for life, without waste, remainder to trustees during his life, to preserve contingent remainders, remainder to his first, *&c.* son in tail male, remainder to his daughters in tail general as tenants in common, with power to the said *Hewer Edgley* to make a jointure of any part not exceeding half the premisses: and if *Hewer Edgley* should die without issue, then he devised that the premisses should be settled in fourths, (*viz.*) one fourth to his cousin *John Blackborn* in fee, another fourth to his cousin *Abraham Blackborn* in fee, another fourth to his cousin *Anne Jackson* in fee, and the remaining fourth to his cousin *Susanna Edgley*, youngest daughter of the said *Anne Edgley*, in fee. And in case all or any of the said four remainder-persons should be dead at the time, when by virtue of the said settlement his estate was to devolve upon them, then the fourth part, to which the person so dead should have been intitled to, if living, should be conveyed to the respective heirs of the person so dead; and devised the residue of his personal estate (subject to the aforementioned legacies) to be laid out in land and settled in the same manner as he had before devised his real estate, and made his trustees executors, and died. [602]

The testator was seised in fee of some little land by him always employed for the producing hay and corn which was constantly spent in the house, and the land was plowed with the coach-horses which the testator kept.

The kinsman *Hewer Edgley* married the daughter of Sir *Simeon Stuart*, and he and his wife were not inclined to live with the mother Mrs. *Anne Edgley* at the house at *Clapham*; *Hewer Edgley* appointed a jointure to his wife, exceeding a

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moiety of the premisses, and *Susanna Edgley*, one of the four devisees in remainder, died without issue unmarried.

Samuel Edgley the father of *Hewer*, prepared a bond for *Hewer Edgley* to sign for the payment of 120*l. per annum* to the father for life, which the son for some time declined to execute, saying it was more reasonable that the father should depend upon his honour: upon which the father left the bond with him, declaring if he would not sign it, he might let it alone. But afterwards *Hewer Edgley* the son, in the absence of the father, just before he went to travel, did sign it, and directed that it should be delivered to his father.

In this case the following points were debated, and resolved by the Lord Chancellor.

First, It was objected, that though the house at *Clapham* passed to the mother for her life if she would live there, yet only the house and curtilage would pass, and not the land employed for the producing hay and corn, *&c.* and the rather, [603] because all his lands and freehold estate were devised elsewhere, to trustees for the cousin *Hewer Edgley* for life, *&c.*

By a devise of a house *cum pertinentiis*, only the garden and orchard will pass with it; but by a devise of a house with the land appertaining thereto, the land usually occupied therewith will pass. One devised that his cousin *A.* should continue to live at his house, and be at the charge of keeping the house, and the servants, and coach-horses, which the testator employed in plowing the ground, and spend the corn arising therefrom in the house; here the land enjoyed with the house shall pass to the cousin *A.*

Sed per Cur': By the same reason it might be objected that the house at *Clapham* is devised away, which however is not pretended. It is true, that by the grant or devise of an house (1) *with the appurtenances*, only the garden and orchard will pass with the house; but the devise of the house (2) *with the lands appertaining*, will pass the land in question. Now the intention of the testator was, that after his death, during the life of his kinswoman *Anne Edgley*, every thing should be carried on and transacted as it was in his life-time, and this to such a nicety, as that the same number of servants and even of coach-horses was to be employed, the same hospitality observed, the same horses used in plowing the lands; which could not be, unless the lands were to continue as before to be enjoyed with the house; wherefore as it seems to have been his intention not to part them, let those lands which were before constantly enjoyed with the house, and the profits whereof were applied to the maintenance of the house, continue to be so enjoyed.

(1) Vide Com. Dig. Devise, N. 3. Grant, E. 9.

(2) Vide *Gulliver* v. *Poyntz*, 3 Wils. 141. (*z*) *Doe* v. *Martin*, 2 Black. 1148. (*y*)

(*z*) 2 Black. 726. S. C.

(*y*) *Doe* v. *Collins*, 2 T. R. 498. *Buck* v. *Nurton*, 1 Bos. & P. 53.

Secondly, It was insisted that it appeared plainly *Hewer Edgley* and his wife and family were to have the liberty of cohabiting with, and being dieted by his mother at this house at *Clapham;* and therefore if he should waive that, or elect to live from his mother, this would exempt her from any necessity of expending so much, and consequently there ought to be a proportionable abatement out of the 120*l. per annum*, which was allotted to be paid to her for housekeeping.

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One devises a house, and directs by will that an annuity of 120*l.* per annum be paid to his cousin, and that she shall maintain her son there; the son chuses to go from her, still the cousin shall have the 120*l.* per annum in the same manner as if the son had died.

Cur': I admit *Hewer Edgley* might live at the house at *Clapham* with his mother as formerly he did with the testator; but if he would live there with a greater number of servants or horses than were there in the testator's life-time, it seems to me that his mother is not bound to maintain them. She is only to maintain him in the same plight and manner as the testator did; neither ought there to be any abatement of the 120*l. per annum* by reason of the son's absence, any more than there ought to have been for the years that the said *Hewer Edgley* travelled and was beyond sea after the testator's death; and as though he had died, there should be no abatement of the 120*l. per annum*, by the same reason there should be no abatement in respect of the voluntary absence of the said *Hewer Edgley*; for the testator intended that in all events, during the life of his cousin *Anne Edgley*, there should be the same hospitality as in his life-time, only in case *Anne Edgley* should leave the house (which was left entirely to her election) then indeed she was to have but 25*l. per annum*, instead of the 120*l. per annum*; but this latter sum was to be paid her very exactly, (*viz.*) quarterly, during her stay there; and care is taken, that even the repairs of the house shall be paid out of the other part of his estate.

Thirdly, Objected that the jointure made by *Hewer Edgley* on his wife, exceeded a moiety of the premisses, and consequently, having gone beyond the power, was void.

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A settlement is directed to be made on *A.* with a power to make a jointure of a moiety. *A.* before the settlement makes a jointure of what exceeds a moiety; court will take no notice of this during the husband's life, for it may never take effect.

Cur': Here neither is nor can be any jointure, for as yet the son *Hewer Edgley* has no legal estate till the trustees convey to him, and until he has an estate he can pass none: wherefore I can take no notice of this * equitable appointment; nor can it properly come in question at this time, not being to take effect till after the husband's death, and perhaps never will, as he may survive his wife.

Fourthly, Objected, that *Hewer Edgley* by virtue of the

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words [*if he die without issue of his body*] should have an estate-tail in the premisses, and then it would be in his power to bar the remainder by a recovery; and this was the rather an estate-tail in him, for that otherwise the daughters of his son could never take, which would be against the testator's intention.

To which it was answered, that here was an express estate for life limited to *Hewer Edgley*, and the words [if he should die without issue] being only words of implication, would not merge and destroy an express estate for life, according to *Bamfield* and *Popham*, ante, 54.

[*606]

If a devise of land to *A.* for life, and if *A.* die without issue, then to *B.* though here is an express estate for life to *A.* yet the subsequent words will turn it into an estate tail; but where lands are devised to *A.* for life, remainder to trustees, &c. remainder to his first, &c. son in tail male, &c. and if *A.* dies without issue, then, &c. this will not give an estate-tail to *A.* but the words [without issue] must be intended without such issue.

But the court exploded the notion, that words of implication should not turn an express estate for life into an estate-tail, and said, that if I devise an estate to *A.* for life, and after his death without issue, then to *B.* this will give an estate-tail to *A.* according to *Sunday*'s case, 9 Co. 127. *b.* † But here being a limitation upon *Hewer Edgley*'s death to his sons, and after to his daughters, the following words [*if* Hewer Edgley *should die without issue*] must be intended, if he should die without (*a*) such issue. And as to what had been urged, that unless these words were to create an estate-tail in *Hewer Edgley*, his son's * daughters could not take; it did not appear the testator intended *Hewer Edgley*'s son's daughters should take, for he might think that on *Hewer Edgley*'s dying without issue male, his name and family would be determined, for which reason he might limit it over to the daughters of *Hewer Edgley* himself; besides, the son of *Hewer Edgley* would be tenant in tail, and when of age might, by docking the intail, give the premisses to his daughters. (1)

(*a*) Vide Humberston v. Humberston, ante, 332.

One devises his freehold estate to trustees and their heirs, in trust to convey the premisses to *A.* for life, remainder to his first, &c. son in tail male successively, remainder to his daughters in tail-general, and if *A.* should die without issue, then the premisses to be settled on *B. C. D.* and *E.* to each one fourth in fee; and in case any of the four remainder persons die without issue, the trustees to convey such fourth part in fee to the respective heirs of the person so dying: one of the persons dies without issue, her fourth in equity belongs to her brother, as her heir.

Fifthly, Objected, that on the death of *Susanna Edgley* the devisee of one fourth of the premisses in remainder, in case *Hewer Edgley* should die without issue, her fourth part was not to descend to her elder brother and heir at law *Hewer*, but to

† *Sed quære*, for in *Sunday*'s case there is no express estate for life given to the first devisee, *ante*, 57.

(1) Vide *Bamfield* v. *Popham*, ante, 54.

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be subject to an executory devise to such person as would be heir at the death of *Hewer Edgley* without such issue as aforesaid, and not to vest in the mean time.

Cur': This remainder in fee of a fourth part does vest in *Hewer Edgley* as heir of his deceased sister *Susanna*; for she having a devise of the fourth part to her in fee, the words directing a conveyance to be made in case of her death to her heir, are no more than what would have otherwise been implied, *et expressio eor' quæ tacite insunt nihil operatur.*

Sixthly, Neither is the furniture of the house at *Clapham* to be sold, while Mrs. *Anne Edgley* stays there; for it being said by the will, that if she thinks fit on the marriage of *Hewer Edgley* to quit the house and goods, this shews that until then she was to enjoy them. But the words are not strong enough to carry the goods as heir-looms with the house after Mrs. *Anne Edgley* should quit it or die; then they shall be subject to the trusts of the will.

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Seventhly, As to the son's bond to pay the 120*l.* *per annum* to his father; the words said by the father [that if the son would not sign it he might let it alone] might be spoken in such a manner as to amount to a threatening, and with design to intimidate the son; but it might also be otherwise; and the son having said that this ought to be left to his honour, the father seems to have acquiesced under it; after which the son as bound in honour, without the privity of his father, and in his absence executed the bond, and directed it to be delivered to his father; so that for ought appears it was his free act, and what he thought himself obliged in honour to do; and therefore, without any proof to impeach it, should not be set aside in equity.

A son in plentiful circumstances gives his father a bond to pay him 120*l.* annuity for his life; if done freely and without coercion, good; and what words or circumstances will not be construed a coercion.

2. Bea. 452.

LOYD *versus* READ.

CASE 176.

LORD CHANCELLOR PARKER.

A Grandmother put 100*l.* into the exchequer upon the (*a*) act which gives 14*l.* *per cent.* annuities for lives, and her grandchild being made nominee, the father of the grandchild gave a bond to the grandmother to repay her this 100*l.* in case the child should die in the life of the grandmother.

(*a*) 5 W. & M. cap. 20.

Grandmother buys an annuity in 14*l.* per cents. for 100*l.* in the grandchild's name. Child's father gives the grandmother a bond to repay the 100*l.* if the child dies before the grandmother, who receives the income and keeps the talley, the grandchild making no claim: this no trust for the grandchild. (*z*)

(*z*) See *Lamplugh* v. *Lamplugh*, ante 111. *Rider* v. *Kidder*, 10 Ves. 360. *Grey* v. *Grey*, 2 Swan. 594, 2 Fonb. Eq. Book 2. c. 5. s. 2.

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The talley was kept, and the income of this annuity received by the grandmother during her life, and disposed of by her will, from this to another grandchild.

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Decreed by *Lord Chancellor*, that the grandmother's receiving the income of this annuity during her life, and keeping the talley, and no claim having ever been made by the grandchild, shewed the grandchild was but a trustee for the grandmother, and if this was at all a trust, it must be always *et ab origine* so, that the child's father giving the bond, and the grandmother's accepting it, tended to make this still more manifest. Then there being no mention made of the trust in the bond, was an inducement to think, that had it been mentioned therein, the grandmother would not have accepted it.

The court thought that what prevailed with the father to give such bond, was the chance of the grandmother's giving the annuity to the grandchild, or at least not giving it from him; and that probably, if the grandmother had not given it from him, this would have been taken as a conditional gift to the grandchild after the grandmother's death; and that the case might have been different, if the grandmother, or parent had made such a purchase in a grandchild's or child's name, and taken the profits during the infancy (*a*) only of the child, for that would have been no evidence of a trust for the parent. *Secus* if the parent had taken the profits after the child's coming of age, and when of discretion to claim his right.

(*a*) Vide ante, Lamplugh v. Lamplugh, 111.

It was moreover observed that (*b*) Lord *Nottingham* took a distinction where a parent made a purchase in the name of a child already advanced, and thereby as it were emancipated: for that would have been a trust for the father; but if such child were unadvanced before, it ought (according to him) to be looked upon only as an advancement of one for whom he was under an obligation of duty and conscience to provide.

(*b*) Lord Grey v. Lady Grey, Hill. 30 Car. 2. (*z*) and vide Elliot v. Elliot, 2 Chan. Cases, 231.

(*z*) 2 Swan. 594.

BURNET *versus* THEOBALD.

CASE 177.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 280. pl. 2. If after a decree be entered to stay the signing and inrolling, it stays the signing 28 days, not only after pronouncing the decree, but 28 days from the presenting it to Lord Chancellor to be inrolled, and notice given by Lord Chancellor's secretary to the clerk of the other side. (*z*)

IF after a decree pronounced, either side enters a caveat, this stops the signing and inrolling for twenty-eight days, being a lunar month; but a decree being signed and inrolled after the twenty-eight days from the caveat were expired, and within twenty-eight days after the decree was presented to be inrolled, and the regularity of the inrolment being referred to the master Mr. *Holford*, he certified the course to be, that where a caveat is entered, the party entering it has twenty-eight days after the decree presented.

But *Lord Chancellor* thought this an unreasonable delay, there being no (*y*) rule or order of Court for that purpose.

On the other side it was said that the end of entering such caveat was to give the party a reasonable time to consider of the decree, whether he should submit to it, or rehear the cause, which end would not be answered, unless the party had a reasonable time after the decree was drawn up and passed; and the allowance of the twenty-eight days after the entering of the caveat was immaterial, since these are commonly spent after the hearing the cause, and before the decree is drawn up and passed.

Also the *Master* certified that the twenty-eight days upon the caveat, should commence only from the time that the Lord Chancellor's secretary gave notice to the clerk of the other side, of the decree being presented in order to be signed, which was likewise thought by the Court to be strange; *et adjourn.*'

But afterwards this matter being mentioned again, and a [610] certificate of much the greater number of clerks in the office being produced, shewing the constant course and practice of the office to be, that the twenty-eight days should be accounted from the time of the decree's being presented to the great seal to be signed in order to its inrollment, and notice thereof given by the secretary to the clerk of the other side:

(*z*) See *Robinson* v. *Newdick*, 3 Mer. 13. If however the enrolment has been obtained by surprise, the court will vacate it, *Kemp* v. *Squire*, 1 Vez. 205. *Anon.* ib. 326. *Stevens* v. *Guppy*, 1 Tur. 178. And see *Picket* v. *Loggon*, 5 Ves. 702. *Charman* v. *Charman*, 16 Ves. 115.

(*y*) But see order of 17 June 1698. Beames's Ord. Chan. 308.

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Lord Chancellor said this seemed to him to be the constant practice, and the Master's report being so, his Lordship would not over-rule it on a motion, but on the contrary held the report to be right, and according to the usage and practice in that case.

CASE 178.

Ex parte JAMES.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 96. pl. 2. 98. pl. 2. Creditor by bond before day of payment cannot take out a commission of bankruptcy, nor ought any proceeding to be had upon such commission.

A. Was bound in a bond to *B.* payable on *May-day* then next; *A.* in the mean time becoming a bankrupt, *B.* before *May-day* takes out a commission of bankruptcy against him, and the commissioners having summoned his wife, would have examined her touching the time and manner of *A.*'s becoming a bankrupt, but she refusing to make any such discovery, they committed her. And some of *A.*'s creditors who came in under the commission, and paid their contribution money, imprisoned *A.* for the debt for which they sought relief by the commission; and upon the petition of *A.* and his wife disclosing these matters, and hearing counsel on both sides,

It was resolved by *Lord Chancellor, first,* that if a creditor by bond before the day of payment sues out a commission of bankruptcy against the obligor in the bond, it is irregular, and such an irregularity, for which the commission ought to be superseded; for though it be *debitum in præsenti* (*a*) yet as it cannot be so much as put in suit, or an action commenced upon it, much less can there be a commission of bankruptcy taken out on such bond, whereby all the real and personal estate of the bankrupt is (as it were) seised in execution.

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(*a*) Vide autem 7 Geo. 1. cap. 31. & 5 Geo. 2. and how these statutes have altered the law in that point.(*z*)

Bankrupt's wife cannot be examined against her husband to prove his bankruptcy; may by statute touching discovering her husband's effects. 12 Vin. Ab. 11. pl. 28. S. P. (*b*) 1 Inst. 6. b. 2 Vern. 79. (*c*) 5 Geo. 1. cap. 24. (*y*)

Secondly, That the wife of the bankrupt cannot be examined against her husband touching his bankruptcy. She by the common law cannot be a witness (*b*) for or against her husband; and though the former statute of 21 Jac. 1. authorizes the commissioners to "examine the wife touching any concealments of the goods, effects or estate of the bankrupt," yet neither does that, or the (*c*) late statute of the last sessions extend to examining the bankrupt's wife touching his bankruptcy, or whether he had committed any act of bankruptcy, and how or when he became a bankrupt.

(*z*) See Stat. 6 Geo. 4. c. 16. s. 15. *Crowley's Case,* 2 Swan. 1. 30. Buck. 264.
(*y*) 6 Geo. 4. c. 16. s. 37. And see

And the Court said, that until the late statute abovementioned concerning bankrupts, the Commissioners could not examine the bankrupt himself touching his bankruptcy, and that in this act there is no clause enabling them to examine the bankrupt's wife against her husband. And though the warrant of commitment of the wife was produced, by which it appeared that the Commissioners had committed her *as well for refusing to discover the goods and effects of the bankrupt*, as to discover the time and manner of his bankruptcy: yet by *Lord Chancellor*, one of the reasons for committing the wife being for not discovering how and when her husband was a bankrupt, and she being to continue in prison till she should make this discovery, the commitment is illegal, and she ought to be discharged; and accordingly it was ordered she should be discharged.

EX PARTE JAMES.

Bankrupt himself, by statute 5 Geo. 1. may be examined touching his own bankruptcy.

If one of the reasons for the commitment be illegal, and the party to continue in custody till the thing so illegally required of him be done, the whole commitment is naught.

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Thirdly, It was resolved that such of the bankrupt's creditors as came in under the commission by which all the bankrupt's estate both real and personal (by means whereof he should pay his debts) was seised, should not be allowed to imprison the bankrupt for not paying those debts. Wherefore the Court said they would order the bankrupt to be discharged out of custody, as to any action brought by those who had come into the commission of bankruptcy, and had sought relief thereby. (1) And though it was objected by Mr. *Mead*, that the bankrupt ought not to be discharged until he had perfected his examination,

Creditors of a bankrupt who come into the commission, shall not imprison the bankrupt for not paying the debt.

The Court held the contrary; for it did not appear that the bankrupt was in contempt or had refused to be examined; if he had, yet when the commission of bankruptcy was irregularly sued out, there ought not to be any proceedings upon it by way of examining the bankrupt or otherwise.

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(1) Sed vide Ex parte *Salkeld*, ante, 560. Anon. post. Vol. II. 394. (*z*)

(*z*) *Ex parte Callow*, 3 Ves. jun. 1.

Case 179. GRANTHAM *et al'* Commissioners and Trustees of the Forfeited Estates *versus* ALEXANDER GORDON. *(In Domo Procerum.)*

Attainder of Major General Thomas Gordon, Laird of Auchintoule, will not extend to attaint the party, if his name be Alexander, though the rest of the descriptions agree.

BY an Act of Parliament made in the first year of King *George*, for the attainder of Earl Marischal *et al'* it was enacted (*int' al'*) " that if Major General *Thomas Gordon*, Laird of *Auchintoule*, should not render himself before such a day, he should be attainted of high treason. (*z*)

[613] Major General *Gordon*'s christian name was *Alexander*, not *Thomas*, and he did not render himself within the time.

The commissioners of the forfeited estates in *Scotland* adjudged that the respondent *Alexander Gordon* was not attainted : whereupon the commissioners for forfeited estates in *England* appealed to the House of Lords.

It was insisted for the forfeiture, that here was a full description without a christian name, (*viz.*) Major General *Gordon*, Laird of *Auchintoule*, which was a sufficient certainty ; for every one must know who was meant by it ; and if the description without the christian name was sufficient, then *utile per inutile non vitiatur*.

That as in 1 Inst. 3. *a*. a grant made to *John* Earl of *Pembroke*, when his name is *William*, or to *John* Bishop of *Rochester*, when his name is *William*, is good, because there can be but one of that dignity, but one Earl of *Pembroke*, and but one Bishop of *Rochester*, (wherefore the addition of a false christian name would not hurt it,) so in the principal case there being but one Major General *Gordon* Laird of *Auchintoule*, this description could answer no person whatsoever but the respondent.

(*z*) From the report of this case, 8 Toml. P. C. 254. it appears that by Stat. 1 G. 1. c. 50. all lands, &c. whereof any person attainted was seised, were vested in his majesty for the use of the public : and by Stat. 4 G. 1. c. 8. were vested in the commissioners the appellants, to be sold for the public use. The commissioners having seised the lands of the respondent under colour that he was meant by the attainder of Major General *Thomas* Gordon, the respondent in pursuance of 5 G. 1. c. 22. presented exceptions against the seisure to the lords of Council and Session in *Scotland*, who decided " that the public, " by the attainder of Major General " *Thomas Gordon*, has no right or in- " terest in the said estate of Major Gene- " ral *Alexander Gordon* of *Auchin-* " *toule*," and therefore sustained the exceptions. Against this decree the commissioners appealed.

Also that there was sufficient certainty according to the course of Parliament; and therefore that might be good by way of impeachment, which would not be so in a proceeding by indictment, for which purpose Dr. (*a*) *Sacheverel's* case was cited.

(*a*) St. Trials, vol. 4. 966.

For the respondent it was argued, that there ought to be a legal certainty, not only in indictments for capital, but for all criminal offences, and much more would the law require certainty in the case of an indictment for an offence, whereby a man's blood was to be corrupted, his estate forfeited, and his life taken away in the most formidable manner.

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That though it might be true (which however was not admitted), that an attainder would be good by the description of Major General *Gordon*, Laird of *Auchintoule*, and that there might be such a man; yet adding a wrong christian name was much worse than if there had been no christian name at all; for there might be such a man as Major General *Gordon*, Laird of *Auchintoule*, and yet no such man as Major General *Thomas Gordon*, Laird of *Auchintoule*.

That the case cited from 1 Inst. 3. *a*. might be allowed to be law, and yet that no ways like the case now under debate; because in a grant the law takes it as strongly as may be against the grantor, *ut res magis valeat*, it being presumed that some valuable consideration was given for the grant, and it would be very hard, that the purchaser by reason of a mistake of his name, should lose his purchase; wherefore it is sufficient to make the grant good, if it can appear who was intended to take, because the grant of the party founded upon the contract of the party, shall take effect according to his intent, and purchases may be good without either christian or surname, as the eldest son or youngest son of *J. S.* (1 Inst. *ubi supra*); but in case of an indictment the construction is not to be according to the intent of the indictment, but must be strictly certain; and if an indictment is to be so, much more must an attainder, which binds for ever, both as to life and estate; and an indictment of one by the description only of the eldest or youngest son of *J. S.* would not be good.

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That the names of *Alexander* and *Thomas* were two as different names as well could be, and therefore it was impossible that *Alexander Gordon* could be intended to be *Thomas Gordon*.

That supposing Major General *Alexander Gordon* were attainted by his *right* name, and afterwards pardoned by the *wrong* name of *Thomas Gordon*, this pardon would not be good,

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because it could not be intended a pardon of the same person that was attainted. And it would be very hard that such an attainder as was in the principal case, should notwithstanding the mistake of the name, be good *to take away* a man's life, and yet that a *pardon*, by reason of the same mistake of the name, should not be good to *save* the man's life; [which reason had great weight with the Lords.]

That if this attainder of *Alexander* by the name of *Thomas* were to be good, an innocent man might be executed instead of the guilty; and it would be sufficient to say that *Alexander* was the man intended, though *Thomas* was the man attainted. But as incertainty was the mother of confusion, so it was the happiness and excellency of our law to delight (*a*) in, and especially in criminal prosecutions to require, certainty.

(*a*) Ante, 194. in the case of Mitchel v. Reynolds.

That if *Alexander Gordon* were outlawed by the name of *Thomas Gordon*, the law in that case would allow him no redress by writ of error, because he would not be hurt, nor any ways concerned in the outlawry of one who was supposed to be another person; and yet where the law said the person was *not hurt* or any ways concerned, the attempt now was to *hang* that man and to *take away all his estate.*

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That the objection was the stronger in the principal case, for that the not rendering himself (by the time prescribed by the act) made the treason; and here *Alexander* might well think himself not the person intended and required to surrender, when the act required *Thomas* to surrender; consequently it would be hard, that his not doing of that which he had at least very probable reason to think not incumbent upon him to do, should render him guilty of the highest crime known in our law, high treason.

And as to what was said, that this being an attainder by Parliament differed from an outlawry, and that the course of Parliament made it good: it was answered that impeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament; but that there was no other method of construing an Act of Parliament (as this was), but according to the rules of law.

Lastly, that if the respondent *Alexander Gordon* thus intended (as it was said) to be attainted by the name of *Thomas*, had been brought to the King's bench bar, that Court would not nor could have awarded execution against *Alexander Gordon* on the attainder of *Thomas*, but on *Alexander*'s shewing this to the Court, they must have discharged him.

Upon which the counsel being withdrawn, the Lords ad-

journed the debate till the next day, in order to have the opinion of all the Judges of *England*, when the Lord Chief Justice *Pratt* delivered (1) the opinion of them all "that this attainder of Major General *Thomas Gordon*, Laird of *Auchintoule*, did not attaint the respondent, whose name was *Alexander*; and that if *Alexander Gordon* upon such an attainder had been brought to the King's Bench Bar, and had made this matter appear, that Court could not have awarded execution against him." Upon which the decree of the commissioners for forfeited estates in *Scotland* was affirmed.

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Memorandum, in this case it was admitted by the counsel on the other side, that by the late statute for the union of the two kingdoms of *England* and *Scotland*, treasons and prosecutions for treason are the same in *Scotland* as here.

In Scotland the trials and prosecutions for treason are the same as in England.

I was of counsel for the respondent, and Mr. *Bootle* for the appellants, and also a *Scotch* lawyer on each side †.

† The like determination was made by the Lords in the *December* following, in the case of *Grantham et al'* v. *Farquharson*, who was pretended to be attainted by the name of *Alexander Farquharson*, whereas his christian name was *Patrick*.

(1) Vide Lord *Pitsligo*'s case, *Forster*'s Crown Law, 81. (*z*)

(*z*) 8 Toml. P. C. 257.

DE TERM. PASCHÆ, 1720.

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1. Keen. 784.

VISCOUNTESS MONTACUTE *versus* HER HUSBAND SIR GEORGE MAXWELL.

CASE 180.

THE plaintiff brought a bill against the defendant her husband, setting forth that the defendant before her intermarriage with him did promise that she should enjoy all her own

LORD CHANCELLOR PARKER. Pre. Cha. 526. Gilb. Chan. 244. 1 Eq. Ca. Ab. 19. pl. 4. 1 Stra. 236. 2 Eq. Ca. Ab. 592. pl. 6.

An agreement made by the husband before the marriage, without writing, within the statute of frauds. (*z*)

(*z*) See *Dundas* v. *Dutens*, 1 Ves. jun. 199. *Randall* v. *Morgan*, 12 Ves. 67.

VISCOUNTESS MONTACUTE v. MAXWELL.

estate to her separate use; that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him: but engaged that upon his honour she should have the same advantage of the agreement, as if it were in writing drawn in form by counsel and executed; upon which the marriage took effect, and afterwards the plaintiff wrote a letter to the defendant her husband, putting him in mind of his promise, to which the defendant her husband, wrote her an answer under his hand, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command.

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To this bill the defendant pleaded the statute of frauds and perjuries (*a*) by which "all promises in consideration of marriage, unless signed in writing by the party, are made "void;" and averred that he never signed any promise or agreement before marriage for her enjoying any part of her estate separately, which he pleaded in bar of any relief or discovery.

(*a*) 29 Car. 2. c. 3.

It was urged against the plea, that this promise was on the plaintiff's side executed by her intermarriage; and therefore like the several cases in which equity did relieve, and compel a mutual execution; that the letter written by the defendant, though after marriage, was an evidence under his hand of the agreement before the marriage, and so took it out of the statute.

On the other side it was said, that the express words of the statute made all such promises in consideration of marriage void, unless they were in writing signed by the parties; and that there was the greatest reason for it, since in no case could there be supposed so many unguarded expressions and promises used, as in addresses in order to marriage, where many passages of gallantry usually occur, and it was therefore provided by the statute, that all promises made in consideration of marriage should be void unless signed by the party. That it was very wrong to call *marriage* the execution of the promise, when until the marriage it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore to say that the marriage was an execution which should render the promise good, was quite frustrating the statute: which the Court took notice of and approved.

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Lord Chancellor: In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honour, word or promise of the defendant, the statute making those promises void, equity will not interfere; nor were the instructions given to counsel for preparing the writings material, since after they were drawn and ingrossed, the parties might refuse to execute them; and as to the letter, it consists only of general expressions; as "that the estate should be at the plaintiff's command or at her service;" indeed had it recited or mentioned the former agreement and promised the performance thereof, it had been material. But as this case is circumstanced, allow the plea.

Also this plea being in bar of a discovery as to all matters, which if discovered and admitted might be barred by the statute, so far may the statute be pleaded in bar of such discovery. (1)

(1) But upon the plaintiff's amending her bill and charging several additional facts, a second plea of the statute of frauds put in by the defendant, was ordered to stand for an answer. 1 Stra. 236. See more as to pleas of the statute in cases of parol agreements, in *Hawkins* v. *Holmes*, post. 770.

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LEWIS *versus* CHASE. (1)

CASE 181.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 125. pl. 5. 185. pl. 5.

A creditor petitions against the allowance of a bankrupt's certificate, upon which the bankrupt gives him a bond for payment of his whole debt in consideration of withdrawing his petition; equity will not relieve against this bond.

THE plaintiff being a bankrupt endeavoured to be discharged with the consent of four fifths of his creditors in number and value, upon the late statute; the defendant a creditor preferred his petition to the Lord Chancellor against the allowance of the certificate; upon which the bankrupt, in consideration of the defendant's with drawing his petition, gave him a bond for his whole debt. Afterwards the bankrupt's certificate was allowed, and the defendant putting the bond in suit* against the bankrupt, he pleaded the act of parliament, and that the

(1) Reg. Lib. B. 1719. fol. 272.

LEWIS v. CHASE.

bond was obtained in order to procure his discharge; and on a verdict for the plaintiff, the bankrupt brings this bill, insisting that the bond was obtained from him under his necessities, and within the reason of that clause in the (*a*) statute which makes bonds void for consenting to the bankrupt's discharge; and it was represented as an unconscionable thing for one creditor to desire more than his share of the bankrupt's estate with the rest, and that on the other hand the bankrupt ought to be favoured, who had given up all to his creditors.

(*a*) 5 Geo. 2. c. 30.

Cur': Here is an honest creditor, and the bankrupt if he pay him all, still pays but what in conscience he ought. He that comes into equity to avoid the payment of a just debt, ought to come with a very clear case if he hopes to succeed. The defendant could not be said to do amiss in petitioning the great seal against the allowance of the certificate; neither can it now appear to me what success that petition would have been attended with; it may be he had just cause to petition, and the bankrupt no right to have the petition disallowed, and the plaintiff, if he had a fair defence, ought to have made use of it against the petition, but in case of treating with the defendant to withdraw it, the other might insist upon reasonable terms to have his just debt.

Suppose the present bill were to be dismist, the consequence would only be that the plaintiff must pay what he justly owes; but were he to be relieved, the defendant would thereby be put into a worse condition than any of the other creditors; for the bankrupt's estate being distributed, he cannot now have his proportion thereof, so that he must lose his whole debt; and it is the plaintiff's fault to come so late: which makes the case still the stronger against him; nor does the law make any distinction whether the bankrupt became so by his own extravagant way of living or by misfortunes; and therefore he is the less to be favoured. It is hard enough to bar creditors of the full remedy which the law gives for the recovery of debts; indeed where the words of the statute are plain they must be submitted to, but then the bankrupt ought in all such cases to bring himself within it. And it would not be fair to put the defendant, who has the law on his side, in a worse condition than any of the other creditors whose debts are extinguished by the statute; therefore dismiss the bill with costs. (1)

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(1) But a late determination of the court of C. P. in *Sumner* v. *Brady*,

EDWARD TREVOR eldest Son of Sir John Trevor, late Master of the Rolls, *et al'*, } Plaintiffs;

JOHN TREVOR the second Son, *et al'*, } Defendants.

Case 182.

Lord Chancellor Parker.

SIR *John Trevor*, late Master of the Rolls, being seised in fee of the capital messuage called *Brinkynall*, and diverse lands in the counties of *Denbigh* and *Salop*, on his marriage with *Jane Puleston*, by articles dated the 23d of *October* 1669, in consideration of the then intended marriage, did for himself and his heirs covenant with the trustees therein named, before the end of two years to settle and assure upon the said trustees, as they the said trustees should direct and appoint, all the premisses to the several uses in the articles expressed, * as also in the settlement and conveyance, as should be limited and agreed upon by Sir *John Trevor* and the said trustees, and to no other use, (*viz.*) to the use of him the said Sir *John Trevor* for life without waste, remainder to the use of *Jane* his intended wife for her life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male lawfully issuing, remainder to his own right heirs.

1 Eq. Ca. Ab. 387. pl. 7. 9 Mod. 161. 10 Mod. 436. 2 Eq. Ca. Ab. 475. pl. 4. 505. pl. 1. One articles on marriage to settle lands on himself for life, remainder to the heirs of his body by his intended wife, with a covenant to make this settlement within two years, or in default thereof to stand seised to the same uses; though this be an estate-tail at law, yet equity will turn it into a strict settlement.

Sir *John Trevor* by the same articles covenanted with the trustees, that the premisses should remain after his decease to the said *Jane* his intended wife for her life, free from all incumbrances, and in case the uses therein were not thereafter well and truly raised, according to the true intent and meaning of the articles, that then he and his heirs should stand and be seised of the premisses, until such time as a farther

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1 H. Bl. 647. has expressly contradicted the authority of this case. And indeed it seemed inconsistent with the spirit of many other cases, as *Middleton* v. *Lord Onslow*, post. 768. *Spurret* v. *Spiller*, 1 Atk. 105. *Smith* v. *Bromley*, Doug. 3 edit. 696. *Jones* v. *Barkley*, ibid. *Cockshott* v. *Bennet*, 2 T. R. 763. (z)

(z) And see *Jackson* v. *Lomas*, 4 T.R. 166. *Jackman* v. *Mitchell*, 13 Ves. 581. *Leicester* v. *Rose*, 4 East, 372. (over-ruling *Feise* v. *Randall*, 6 T. R. 146). *Ex parte Sadler*, 15 Ves. 52. *Wells* v. *Girling*, 1 Bro. & B. 447. Stat. 6 G. 4. c. 16. s. 125.

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assurance should be thereof made to the uses of the said articles.

The marriage took effect, and Sir *John* had issue by *Jane*, the plaintiff *Edward Trevor*, and the defendants *John*, *Arthur*, *Tudor*, *Anne* afterwards Lady *Middleton*, and *Prudentia Trevor*.

No settlement was made pursuant to the articles, nor any request by the trustees; and the plaintiff *Edward* incurred his father's displeasure, having without his consent married a woman of no fortune.

1692. Sir *John Trevor* and his wife *Jane* levied a fine of the premisses, declaring the uses thereof to himself and his wife for their lives, remainder to the second son the defendant *John Trevor* in tail male, and so to the younger sons in tail male successively; and this settlement was by consent of the plaintiff's father and mother delivered to the defendant *John Trevor*.

[624] Afterwards Sir *John* (*a*) *Trevor* died intestate, leaving a real estate in *Ireland* of about 900*l.* a year, and some new purchased estates in fee in *England*, which descended to the plaintiff *Edward Trevor*, and possessed likewise of a very great personal estate, the plaintiff *Edward*'s share whereof came to near 10,000*l.*

(*a*) May 20, 1717.

The plaintiff *Edward Trevor* brought his bill to compel the second son *John Trevor* and the other brothers and sisters who claimed under the fine and deed of uses of Sir *John* and his wife, to convey the premisses to himself in tail as heir of Sir *John Trevor* and his lady.

And the cause coming on to be heard before the Lord Chancellor *Parker*,

For the younger brother it was insisted, that these articles were of an ancient date, (*viz.*) in 1669 (about fifty years since,) and that as a limitation of an estate to *A.* for life, remainder to the heirs male of his body, made an estate-tail in *A.* so in the execution of articles in equity they would follow the words, which must create an estate-tail in Sir *John Trevor*.

That the use being to Sir *John Trevor*, *without waste*, remainder to the heirs male of his body by the said *Jane*, made no alteration; it being a constant (*b*) rule, that where an estate is limited to one for life, with a remainder (mediate or immediate) to the heirs male or heirs of the body of the tenant for life, these were only words of limitation.

(*b*) Ante, 371. Hayter v. Rod, and Goodright v. Wright, 399.

[625] That if in any case the law were otherwise, it would be in

that of a *devise* of lands to *A.* for life without waste, remainder to the heirs of his body; yet even in such case, though it were an express estate for life, and though there were the words [sans waste] and though the intent of the party was allowed to prevail more in a will than in any other conveyance, it would notwithstanding be an estate-tail; nay even in case of a devise of a *trust* to *A.* for life without waste, remainder to the heirs male of his body, it had been decreed an estate-tail in *Bale* and *Coleman* (*a*) by Lord *Harcourt*, who reversed the decree of Lord *Cowper* in that case.

(*a*) Vide ante, 142.

Also that the addition of the words [the heirs male of the body of Sir *John Trevor* and the heirs male of such heirs male] was immaterial and but tautology; for the deed having limited the premisses to the heirs male of the body of Sir *John* by *Jane*, the following words did only repeat the same thing over again; and it would have made no alteration, had those words been repeated ten times over, according to 1 Co. 104. *Shelley*'s case, and that of *Legate* and *Sewell* † in 1706, which was sent out of this court to the judges of the common pleas, and was a much stronger case.

It was admitted, that if the limitation had been to Sir *John Trevor* for life, remainder to the *heir* male of his body by Dame *Jane* (in the singular number) and to the heirs male of the body of such heir male, this had been but an estate for life in Sir *John Trevor*, by reason the words [heir male] were in the singular number (*b*) and but a description of the person having a subsequent limitation annexed to them; but even in that case it would have been a contingent remainder, which the fine afterwards levied by Sir *John Trevor* and his lady would have barred. But in the principal case, the first limitation being to the heirs male of the body of *John* by *Jane* (in the plural number) would have made an estate-tail, had it been in a conveyance.

(*b*) 1 Co. 66. b, Archer's case.

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That it was true, latterly in the execution of marriage articles, decrees had gone according to the intention of the parties, as being a matter wholly executory, and in the power of equity to mould and turn as the parties intended; which yet was a pretty strained construction; for when I covenant to convey an estate to one for life, remainder to the heirs male of his body by his wife, and to *no other use* (as is said here); that equity should say it *shall be to other uses*, (*viz.*) to the

† By the opinion of three of the judges of B. C. *cont' Tracy*. See their certificates, *ante*, 88.

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man for life, remainder to trustees to preserve contingent remainders, remainder to the first, &c. son of the marriage, seemed at law a breach of the covenant; and it would sound hard, that there should be no other way of *performing a covenant in equity*, but by *breaking it at law*.

That the construction of these articles must be the same as if they had come under the consideration of a court of equity about the time of the date of them; and then there could be no case cited wherein equity had so far taken upon itself, as to decree the husband but an estate for *life*, when the articles said he should have an *estate-tail*.

However, this case went much farther; for here being no settlement of the premisses made, or required to be made within the two years, this was a covenant to stand seised, by virtue of which Sir *John Trevor* was actually seised of an
[627] estate-tail vested, and these articles being actually executed, were not to be executed over again in a court of equity; no instance could be given, where a legal estate vested by a marriage settlement was afterwards altered and divested in equity.

That suppose this settlement had been by way of lease and release to Sir *John Trevor* for life without waste, remainder to his wife for life without waste, remainder to the heirs male of his body by his wife, equity would never have altered or curtailed the settlement, or turned a vested estate-tail into an estate for life; no instance could be given of that nature; and if so, a covenant to stand seised was as much a conveyance, as compleat and more ancient than a lease and release; for the bargain and sale for a year was but a modern invention † of putting the grantee into possession, to enable him to take a release.

Again, though it might be objected that this covenant to stand seised was only until a settlement should be made, yet till then it was a vested estate-tail in Sir *John Trevor;* and the future settlement was to be made only as it should be agreed on betwixt Sir *John* and his trustees, which now could never be, Sir *John* being dead.

In the next place it was urged, that the equitable circumstances of the case were to be considered.

Here was an eldest son who had provoked his father by a
[628] very improvident marriage, which was but a just occasion for the latter's giving away from him some part of the estate;

† Sir *Francis More* is said to have been the first person who practised this way, by Chief Justice *North*, in the case of *Barker* v. *Keate*, 2 Mod. 252.

notwithstanding which, his father had still been very kind to him:

First, By leaving to descend upon him an estate in fee in *Ireland* of about 900*l.* a year, which with the timber was worth above 25,000*l.* *Secondly*, by leaving to descend upon him diverse lands of value in *England*, purchased by the father after the making the settlement, being above 200*l.* a year; all which it was in the power of Sir *John Trevor* to have given from him. *Thirdly*, by leaving a share of the personal estate to come to him, of near 10,000*l.* value. So that this was more than an equivalent for the estate in question, which the elder brother could not come at but by the aid of equity.

That Sir *John Trevor*'s permitting these lands to descend to his eldest son, was giving them to him; the not hindering him of them when in his power so to do, was a gift of them to him. For this reason it has been decreed, (*a*) where a man by marriage-articles covenanted to settle lands of 100*l.* *per annum* on his eldest son, to take effect after his death, that the leaving lands of 100*l.* a year to descend to such son, was in equity a performance (1) of the covenant. So likewise the statute of distribution makes (as it were) a (*b*) will for every intestate, and consequently this eldest son's share of the father's personal estate, which came to him upon his father's death, is a legacy of 10,000*l.* left him by his father. Wherefore the eldest son could not say he was wronged by that father who has left to descend or come to him an estate of about four times the value of the lands in dispute.

(*a*) 2 Vern. 558.

(*b*) 2 Vern. 710. Ante, Blandy v. Widmore, 324.

But the case was still stronger, if it was considered that, when this settlement was made upon *John Trevor*, he was then a younger son unprovided for, and had attained to manhood; that equity favours such provisions, looking upon them as in nature of a purchase; for which reason, were there a devise of a copyhold without a surrender, equity would supply the want of it for the younger son, as much as it would in the case of a purchase. [629]

Objected, The articles are a lien, a specific lien upon these lands; and if the eldest son has in equity a right to them in specie, the father cannot bind that right by giving him other lands.

Resp. The eldest son can have no right to, or lien upon

(1) Vide *Lechmere* v. *Earl of Carlisle*, post. Vol. III. 224.

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these lands, if the estate be an estate-tail executed by the articles, and consequently barrable by the father, and which the father upon a just provocation has barred; the articles are then executed instead of executory.

But for argument sake, suppose this were otherwise: a court of equity is not bound to execute all articles, but considers the circumstances of the case; and if hardships would ensue on the execution of such articles, equity, under those circumstances, will not decree an execution.

Articles can in no case be a greater lien upon land, than when I covenant to sell my land to another. Suppose then, I article to sell my land to another for half the value, this being an unequal agreement, equity will not execute it: and in the principal case, hardships, many hardships would ensue the execution of the articles. The intention of a dead
[630] father would be frustrated by a son who had received from his father so ample an equivalent; and a younger son at that time unprovided for, would be defeated of his intended provision.

Farther, it was an argument that the only estate intended to be effectually secured by these articles was the mother's estate for life, (*viz.*) her jointure, since the covenant of Sir *John Trevor* went only to this, that the premisses should remain to *her* free from incumbrances, no covenant extending to the *heirs male of the marriage.*

It was of weight also that the late *Master of the Rolls* (who had so long presided in a court of equity with great experience and reputation) was so far from being apprehensive the articles hindered him from disposing of these premisses, that he recited the very articles in the settlement now in question, and was so far from concealing them (which it seems had been an imputation cast upon him by the other side) that he recited by this very settlement his intention to inrol them in chancery. *His Honour* was so well satisfied he had a power over this estate, as to have sold part of it to a purchaser who then quietly enjoyed it; but how long he was to do so, if the plaintiff prevailed, might be a question.

Upon the whole matter, the law was for the defendant *John Trevor* the second son; the equitable circumstances of the case were for him; the intention of his dead father was for him; the opinion too of his father, who might be justly said to have been a great Judge, was also for him; and it was hoped the opinion of the court would be so too.

But *Lord Chancellor* decreed against the defendant *John Trevor* the second son, on these reasons: (1)

That marriage articles were in their nature executory, and ought to be construed and moulded in equity according to the intention of the parties. [631]

Now that intention was plain in this case, and the consideration extended to the heirs male of the body of Sir *John* by his lady, as well as to her in respect of her jointure.

Besides the agreement was to settle the premisses to himself for life *without impeachment of waste*, and to the heirs male of his body by *Jane*, and to the heirs male of such heirs male; so that it could not be doubted but that the intention was, Sir *John* should have an estate for life only, and the privilege of waste would be to no purpose, if he was to have an estate-tail, which would of course have made him dispunishable for waste.

That if within the two years the wife's trustees had called for a settlement, or had brought a bill to compel a performance of the marriage articles, there could be no question, but that according to the several precedents which have been in this Court, equity would have directed the settlement to have been made to Sir *John* for life, remainder to his first son, *&c.* and to say precedents have not gone so high and so far backwards as the date of these articles, seemed immaterial; for what is reason, equity, and good conscience *now*, always *was*, and always *would* be so.

And as, if the trustees had applied within the two years, in order to have a settlement made, it would then have been directed to be made to the first, *&c.* son of the marriage; surely their default or neglect should never hurt the issue of the marriage; it were absurd to say it should. Vol. II. 438. [632]

That it would be a strange and vain construction of the articles, if Sir *John* should have such an estate by them, the limitations of which the very next day he might by a fine destroy; and making such a settlement upon the first, *&c.* son, would not be a breach of the covenant, because it would

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(1) These reasons are stated more at length in 1 Eq. Ca. Ab. 390. And so, *Jones* v. *Laughton*, ib. 392. pl. 2. *Nandick* v. *Wilkes*, ib. 393. pl. 5. *Cusack* v. *Cusack*, 1 Bro. P. C. 470. Et vide *West* v. *Erissey*, post. Vol. II. 349. where an actual settlement was made before marriage. (*z*)

(*z*) And see *Uvedale* v. *Halfpenny*, post. Vol. II. 152. *Dod* v. *Dod*, Amb. 274. *Brudenell* v. *Elwes*, 7 Ves. 382. *Dillon* v. *Dillon*, 1 Ba. & B. 89.

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be a settlement according to the intention of it; and a settlement according to the intention of the covenant is not a *breach*, but a *performance* of it.

That by the whole scope of these articles, they were never designed for a settlement, but only a bare agreement, how, and to what uses the premisses in question should be settled. For first, Sir *John Trevor* covenanted, within two years, to settle and assure the premisses to trustees and their heirs, as they or their heirs or their counsel should appoint, to the several limitations and uses in the articles mentioned, and also in the said settlement, as should be agreed upon by Sir *John Trevor* and the trustees.

That the covenant to stand seised, in the latter end of the articles, could not be taken as a final settlement from the words of it; and the precedent part of them were provisional only, (*viz.*) to stand till a settlement should be made, effectually to answer the intention of the parties.

That the articles gave a right to the eldest son to claim these lands in specie, which if he insisted upon, he must have, and if other lands had been given to him in satisfaction, still he might have claimed these lands, and equity could
[633] not have hindered him. That he did not claim the *Irish*, or after-purchased estate, by the gift of the *father*, but rather of *Providence;* for it was highly improbable that the father, who had given his son such a character in those hard and severe expressions by his deed of settlement, should entertain any favourable intentions towards him. And that the eldest son being a purchaser under the marriage-articles, must prevail against a voluntary conveyance made by the father to his younger son.

That as to such part of the premisses as was sold by Sir *John* for a good consideration, that was but a small part, and the purchaser would still enjoy it, as he had no notice of the articles at the time of his purchase.

Then his Lordship cited the decree in the case of *Bale* v. *Coleman*, where Lord *Harcourt* made a distinction betwixt a devise of a trust of land to *A.* for life, with a power to make leases, *&c.* remainder to the heirs male of his body, holding this to be an estate-tail; but that in articles on a marriage to settle lands to *A.* for life, *&c.* remainder to the heirs male of his body by the wife, the articles being executory, and but as minutes, the settlement should be according to the intention, and consequently to the first son, *&c.*

Lastly, his Lordship said, this appeared to have been the

opinion of Sir *John Trevor* himself, and shewed a decree made by him to the same effect upon marriage-articles.

That if this construction were not made upon marriage-articles, it would give way to fraud and over-reaching, and to the defeating of the manifest intentions of the parties in settlements, in which the issue of the marriage are considered as purchasers. [634]

Wherefore his Lordship decreed that the second son *John Trevor*, and his younger brothers and sisters should join in a fine to the eldest son, to hold to him in tail, with remainders to the other sons in tail successively, according to the marriage-articles.

From this decree an appeal was brought *in Domo Procerum*, where the matter was greatly debated by *Lord Chancellor* and Lord *Nottingham* for the decree, and Lords *Trevor* and *Harcourt* against it; but at length the decree was affirmed without any division. (1)

I was of counsel for *John Trevor* the second son, both in the Court of Chancery, and on the appeal.

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(1) 2 Bro. P. C. 122.

CASE 183.
At the Rolls.

THOMAS BLUNDEN AND HESTER, *ux' ejus*, } Quer'.

FRANCES BARKER *Administr' cum Testament' annex' Johannis Hebbert defunct' et al'.* } Defendentes.

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MR. *Hebbert* the upholder, a freeman of *London*, having issue by his first wife one daughter, the defendant Mrs. *Barker*, married his second wife the defendant *Hester*, and *Feb.* 1684, articled before marriage to settle lands upon her, and leave her 400*l.* in money. The wife before the marriage bound herself to a trustee in a bond of 3000*l.* penalty (reciting the articles) upon condition the bond to be void, if she, surviving the said *John Hebbert* her then intended husband, and *on the receipt of the 400*l.* should release to his heirs, executors or administrators, all her right to his estate real or personal, by virtue of the custom of *London*.

10 Mod. 451. 462. 2 Eq. Ca. Ab. 258. pl. 11. 268. pl. 19. On a freeman's widow's customary part being barred by composition, who shall have the benefit of it; whether the husband or children. Also whether a child's orphanage part be barrable by release or covenant, for a valuable consideration.

BLUNDEN v. BARKER. June 19, 1706.

Mr. *Hebbert* had issue by his second wife one daughter, married to the plaintiff *Blunden*. And after this, advancing his eldest daughter in marriage, by the marriage writings 4000*l.* in money was declared to be towards her portion; and some freehold, together with some leasehold estates were settled upon Mr. *Hebbert* for life, remainder to Mr. *Barker* the husband, his heirs, executors and administrators, and this marriage writing (among others) was signed and sealed by Mr. *Hebbert* himself, who being indebted to his daughter *Barker* for monies and rents received by him during her infancy (and which had become due from estates given her by her aunt and other relations,) Mrs. *Barker*, before her marriage, executed a release to her father of all rights, claims and demands, which she had or might have by the custom of the city of *London*, saving to herself whatsoever her father should vo-

March 6, 1715.

luntarily give her. Some time after, Mr. *Hebbert* made his will, whereby taking notice that his second daughter had married against his consent, he gave a considerable estate to his wife, and about the value of 1000*l.* in land and money to his said second daughter, and after several legacies, bequeathed the surplus to his daughter *Barker*, and died.

The plaintiff *Blunden* and his wife brought their bill for an account of the personal estate of Mr. *Hebbert*, insisting, *First*,

That the freeman's wife having given a bond in 3000*l.* pe-

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nalty, to release her right by the custom to the heirs, executors and administrators of her intended husband *Hebbert*, this had extinguished her right by the custom, she was thereby compounded with, and to be taken as dead; consequently that the children of the freeman were to have one half of the personal estate, and the remaining half to be the testamentary part.

Secondly, That Mrs. *Barker* ought to be barred from taking any part by the custom, and this as well in respect of the release which she had given to her father, of all right which she might have to his personal estate by the custom; as also for that it did not appear, what was the value and certainty of the portion which Mr. *Hebbert* had given her, both in regard to the uncertainty of the leases, and likewise to the uncertainty of what was due from Mr. *Hebbert* to Mrs. *Barker* and how much of what was given on Mrs. *Barker*'s marriage should be applied towards payment of the debt due to her from her father; from all which it was inferred that the plaintiff Mrs. *Blunden* was alone entitled to a moiety of the whole personal estate of the testator, (*viz.*) all the orphanage part.

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Upon the hearing of this cause before the *Master of the Rolls*, his honour took it, and so decreed, that the release given by Mrs. *Barker*, the eldest daughter, of her right to her father's personal estate by the custom, though it might be void in strictness as a release; yet being made for a valuable consideration, was a good (*a*) agreement that she the said Mrs. *Barker* would not claim or intermeddle therewith, and should bind her in equity. Also that the value of the leasehold premisses being uncertain, and the *quantum* of the debts which Mr *Hebbert* owed to his daughter being likewise uncertain, and it not appearing how much of the portion of Mrs. *Barker* should be applied towards payment of the debt due to her from her father, this was a double incertainty, and therefore not within the custom; consequently that Mrs. *Barker* was barred from claiming any of the orphanage part.

(*a*) Vide Vol. II. Cleaver v. Spurling, 526.

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But there remaining some doubt with the Court how the widow's third of the personal estate, on her being compounded with, should be disposed of by the custom of *London*, the parties were ordered to attend the Lord Mayor and Aldermen, who were desired to certify the custom of the city by their Recorder to the Court on this point, (*viz.*) "where the widow "of a freeman is compounded with or barred before marriage "from claiming her customary part of her husband's estate, "and such freeman dies leaving one or more child or children, "is a moiety, or only a third of such freeman's personal "estate, the orphanage part belonging to such child or chil-"dren?" And all other proper directions were reserved until the account of the personal estate should be reported, and the custom certified.

From this decree there was an (*b*) appeal to the Lord Chancellor *Parker*, before whom it was insisted, in support of the decree, that Mrs. *Barker*'s release of all demands, rights or claims which she had or might have by the custom of the city of *London* was a discharge and release of her orphanage part; that by the same reason a freeman's *wife* before marriage might release her customary part, so also might a *child* release his orphanage; nay, that the wife before her marriage had not so much as an inchoation of right: whereas the child of a freeman had an inchoate right, not perfected (it was true) until his father's death in his life-time; that there could be no danger from the possibility of the father's gaining by his authority, without a consideration, or by any indirect methods, a release of the orphanage part from his child, since whenever that case happened, equity would interpose and set aside such release;

(*b*) Mich. term, 1720.

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that if it were void at law, in regard no right to the orphanage part was vested in the child at the time of the making it; yet being for a valuable consideration, it would operate in equity as an agreement to quit and waive his orphanage part afterwards; and that the release in the principal case did import such an agreement by the daughter to waive her orphanage part, as would bind her in equity.

On the other side it was said to have been admitted that at law the child's right to the orphanage part was not releaseable in the father's life-time, because the child neither had nor possibly ever might have any right thereto, any *jus in re*, or *ad rem;* that many things might happen, which would prevent the child's ever having this right; for instance, he might die in the father's life-time, the father might leave no personal estate, or might before his death be disfranchised; and if the child had no right, he could release none. It was compared in point of reason to the case in Lit. sect. 446. Father and son, the father was disseised, the son in the life of the father, released to the disseisor all the right which he had or *might have;* this was held void, because at that time the son had no right; and as in that case the son might have died in the father's life-time, so might the daughter in the principal one; and as there the father might have aliened the land, so here might he have disposed of his personal estate, by investing it in land; that in *Vernon*'s case (4 Co. 1. *b.*) it is said that at common law, if a woman before marriage accepted of a jointure in bar and satisfaction of her dower, yet this would not bar her;
[639] and one of the reasons given in the book is, "because at that "time the woman having no right to dower, could not release "what she had then no right to."

Lord Chancellor: This release is clearly void at law, and for the reason given at the bar, because at the time when it was made, the person releasing had no right, nor possibly ever might have any to the orphanage part. (1)

Whereupon it was insisted to be unreasonable, that if the release in the principal case was void at law, it should yet import an agreement in equity, which being made on a good consideration, might be carried into execution by this court; for that by the same reason every agreement that was void at law, might, from some circumstances attending it, be pretended such a one as equity would carry into execution; that the

(1) Vide *Medcalfe* v. *Ives*, 1 Atk. 64. *Morris* v. *Burroughs*, 1 Atk. 401.

covenanting of the *wife* before marriage to claim nothing of the customary part was warranted by the custom, which called it a composition for such part; but that there could be no such custom shewn to warrant the *child*'s releasing the orphanage part, neither was it within the same reason. The child was not *sui juris;* the awe he was presumed to have of his parent, the duty he owed him, the total dependence he had upon him for all the conveniences of life, would not suffer him to be a free agent in this case, would not permit him to deny giving a release to his father, though upon the advancing to him a portion, much less than the customary share would come to.

On a child's releasing to his father his orphanage part, if the release be gained by threats or unduly, the same will be set aside in equity.

Lord Chancellor: I do not see the argument from the father's power over the child to be of any weight; for if it should ever appear that this power has been abused, * a court of equity would certainly set aside the release thus indirectly gained.

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But then it was urged, that if a portion was to be given by a freeman with his daughter in marriage, and this portion should be mentioned in the marriage settlement, and accepted by the daughter and her intended husband as in full of her orphanage part, even this, however express, would not yet be construed any bar to it, nor did it † seem ever to have been so taken; for if it had, it must have been commonly practised, and thereby have rendered the orphanage custom easy to be eluded, and of little force. Though admitting (for argument sake) that such release would amount to an agreement in equity; yet in the principal case the release was with an express *saving and exception* of what thereafter her father the freeman should *voluntarily give her;* so that it was part of the very agreement by which she did release her customary share, that still she should have what her father might think proper to give her, and it was reasonable and equitable that the daughter, so far as to secure her father's gifts or bequests by his will, should insist upon her right by the custom, it being upon these terms that she submitted to bar herself of the benefit thereof; and if equity would enforce the agreement in any part, it would do so throughout.

Lord Chancellor: This saving is an exception out of the agreement, and makes it as part thereof, that the child should still be capable of taking what her father should be pleased to give her; and as it is made by the daughter with the fa-

† Nevertheless it was so determined in the case of *Medcalfe* v. *Ives* and *Johnson*, 18 *June* 1737. (1 Atk. 63.)

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ther, so it seems plainly to have been in his power to relax or release it; it is absurd to say, that when an agreement is made between two persons, these joining cannot dispense with it. The agreement was made only for the liberty and ease of the father, that the daughter, *against his will*, might not claim any farther part of his estate; but supposing him inclined to give her a farther part, it would be inverting the intention of the agreement, and making those words which were designed to give him a more compleat power over the estate, to restrain him from disposing of it in such manner as he should judge proper. Wherefore by virtue of this saving, the father might dispense with the daughter's covenant; it is no more than a covenantee's releasing his covenant, and the father's gifts to his daughter by will are a demonstration of his intention to dispense with it.

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It has been objected, that the daughter is hindered from claiming any orphanage part, because the certainty of the portion does not appear under her father's hand. (1)

But in reality it does appear under the father's hand in the settlement, what her portion was: It was 4000*l.* in money and some leases, and there is no necessity that the value of these leases, should appear, provided the thing itself be sufficiently evident; this is the rule in such cases: and it is the fairest method imaginable to mention the thing itself that was the advancement in the deed. *Id certum est quod certum reddi potest.*

Object. At this rate the greatest incertainty may be rendered certain, as the most perplexed and intricate account may, in the work of many years, be stated and settled; whereas the city must have intended by their custom, that things should be so plain as to be seen easily and at the first view.

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Leases given to a child by a freeman to be brought into hotchpot and valued.

Resp. But why cannot these leases be valued as well as those of which the residue of the freeman's estate is supposed to consist? And what can be fairer than the offer made, that the other side should have the leases themselves given up and brought into hotchpot? By the same reason that these leases are wholly uncertain in their value, so must 1000*l.* *South-sea*, or *East-India* stock be; and then, if I, being a freeman, give 1000*l.* in money with my daughter to advance her in marriage, this will not bar her of her orphanage part; but if I give my daughter half so much (*viz.*) 500*l.* and a lease worth

(1) *Fawkner* v. *Watts*, 1 Atk. 406.

but 50*l.* more, or a jewel, this will be a good bar to her from claiming any orphanage part. Indeed it is unreasonable to say that the father ought to put the value of the lease in the settlement or will; for if such value were to be conclusive, it would then be in the father's (*a*) power to make the most partial division of the orphanage part among his children imaginable, by over-valuing what he gives to one child, and undervaluing what he gives to another. BLUNDEN v. BARKER.

(*a*) Vide Vol. II. Cleaver v. Spurling, 526.

Object. It is no hardship upon the children, that the father may give what he pleases out of the orphanage part, as little to one child, and as much as he thinks fit to another; because if the father gives ever so little an advancement, yet if he will withdraw his hand, and not sign the writing by which the *quantum* of the child's portion may appear, the child shall come in, upon bringing what he has received, into hotchpot.

Resp. It is not necessary that the *quantum* of the portion should appear under the father's hand; since according to the case of (*b*) *Dean* and Lord *De-la-Ware*, if the certainty of the portion with which the child has been advanced, appears in the freeman's books of account, though written by the † *freeman's book-keeper or his servant*, it is as sufficient as if written by the *freeman himself*, and such advancement may be brought into hotchpot; now if it be sufficient that the certainty of the sum should appear under the freeman's book-keeper or servant's hand, then, as the freeman must be supposed a tradesman, it must also be presumed that he keeps books of account of all considerable sums expended by him; and therefore if the freeman gives any portion with his daughter, that the sum and *quantum* thereof will appear in some of his books of account.

(*b*) 2 Vern. 628.

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† *Quær.* If this is warranted by the certificate in that case, which was as follows: *Dean et ux'* v. *Domin' De-la-Ware*, *May* 9, 1710. "In pursuance of an "order of the 16th of *December* then last, it is certified, that if a freeman of the "city dies leaving a wife and one daughter married in his life-time, and it ap- "pears by the books of such freeman, that he had paid several sums of money "in part of such daughter's portion unto her husband, and afterwards several "other sums, which ought to be taken as paid on account of the portion, but "not expressly entered in such freeman's books as paid in part of advancement, "or in part of the portion (*all which entries are of the testator's own hand writ- "ing*) and such sums taken altogether do not amount to a third of such freeman's "estate, put together with what he left at his death; such daughter ought not "to be taken as fully advanced, but in part advanced only; and in such case by "the custom of the city, such child and her husband are to have a third of what "the testator left at his death, without regard of what was received in the father's "life-time, and without putting what had been so received to the estate left at his "death."

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Object. But the freeman may invest all his personal estate in land, and by that means evade the custom.

Resp. This cannot be well supposed of freemen who are presumed to be traders, and consequently to keep a stock wherewith to manage their trade, which stock is personal estate.

Object. In the principal case there is not only incertainty in the value of the leases which are settled; but also in the *quantum* of the portion that shall be applied towards satisfying the debts the freeman owed to his daughter.

[644] Resp. The release made by the daughter to her father *Hebbert* extinguished that debt; but if not, equity, which always marshals the application of assets in such a method, as that all the creditors may be paid, either out of the real or personal estate, will in the present case marshal the application in this manner, (*viz.*) that the lands settled by Mr. *Hebbert* shall go in satisfaction of the money which he owed to his daughter.

In the last place it was strongly contended that the court should not send it to the *lord mayor and aldermen* to certify, whether, when the widow was compounded with, the husband's testamentary part, and the children's orphanage part should go each in moieties, in the same manner as if the wife were dead? In regard this was said to have been already certified by the city, in the case of (*a*) *Clare* and *Achmooty*, where the children being all fully advanced in the father's lifetime, it was held, that it should be as if there were no children, and so the wife to have one moiety, and the other be the testamentary part; that agreeable hereto it had also been decreed, in the case of (*b*) *Rawlinson* v. *Rawlinson*; wherefore it would be setting this matter at large again, to send it a second time to be certified by the court of aldermen.

(*a*) May 24, 1709.

(*b*) July 8, 1714. (*z*)

But the other side denied † that this custom had ever been

† *Note;* in the case of *Green* v. *Green*, which was heard at the Rolls, *Hill.* 1718. Mr. *Vernon* observed that on this point precedents had been both ways; though the most solemn ones were against the children's having the benefit of the composition made with the wife; to which the court inclined, without then determining it; but afterwards in the case of *Pusey* v. Sir *Edward Desbouverie*, heard *July* 1734, (post. Vol. III. 315.) Lord Chancellor *Talbot* taking notice of the contrary determinations made by the court in this point, said it had of late been settled, that where the wife was compounded withal, it should be taken as if there was no wife, and consequently that the husband should have one moiety and the children the other. The like was held by the Lord *Hardwicke*, in the cases of *Medcalfe* v. *Ives*, and *Morris* v. *Burroughs*, heard *June* 18, and *February* 3. 1737. (1 Atk. 63. 399.)

(*z*) S. C. cited 2 Atk. 628.

as yet so certified, and insisted that the reason of the thing was entirely against it; for what could be more absurd than to suppose a wife dead when she was living? And yet at this rate, if the husband should have compounded with his wife and die intestate, one and the same woman, as to her claim of the customary part, must be taken as dead, with regard to her distributory share, looked upon as living. Surely it was much more reasonable that he who was the purchaser of the wife's customary part, should himself have the entire benefit thereof; that a man should reap the advantage of his own purchase, and thereby amplify the power which he before had over his own estate. Besides, in this case, the bond of the wife before her intermarriage with her husband, being to release to his *executors*, was a farther argument that the executors were to have the benefit of it, and that it should not be absorbed and extinct; and suppose the covenant had been to assign her customary part in such manner as the husband should direct, it would not in such case have been extinct, but must have been assigned accordingly; or if it had happened that the 400*l.* had not been paid to the freeman's wife, would she not then have been at liberty to have taken advantage of the custom; at least so far as to have made up her 400*l.*?

Afterwards (*viz.*) *November* 23, 1720, the following order was made.

"Upon reading the release from the defendant *Frances* "*Barker*, dated the 19th of *June* 1706, the will of the said "*John Hebbert*, dated the 6th of *March* 1715, the articles "dated the 16th of *February* 1684, and a bond of the same "date,

"His Lordship declared, he took this to be an absolute [646] "agreement, that the defendant *Hester* should perform the con- "dition of the said bond, which was, that after her husband's "death, she should release to his executors, and that the "agreement was not that her third part should be absorbed "for the benefit of her children, but should go to his exe- "cutors for the benefit of his will; that his Lordship would "look into precedents, and see whether they come up to the "present case, and also whether the custom of the city of "*London* had been certified as to the question, whether when "the widow of a freeman is compounded with or barred be- "fore marriage from claiming her customary part of her hus- "band's estate, and such freeman dies leaving such widow "living, and also one or more child or children, is a moiety,

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" or third of such freeman's personal estate to be the orphan-
" age part? And in case the custom had already been certi-
" fied in that point, his Lordship would not send it to the city
" again to be certified.

" And as touching the said orphanage part, his Lordship de-
" clared that the testator had a power to release the agreement
" made with the defendant *Frances Barker* before her mar-
" riage, and that he had released the same by his will, by
" giving her the remainder of his real and personal estate; that
" by the words of the release executed by the said defendant
" *Frances Barker*, she was not to be barred of what more her
" father would give her by his will; and the testator having
" thereby given her the remainder of his personal estate, his
" Lordship was of opinion, that one third of the personal estate
" (in case the defendant *Hester Hebbert* should be barred
" thereof) would not fall into, be absorbed, or extinguished in
[647] " the orphanage part, but would fall into and belong to the
" testamentary part; and the plaintiff *Hester* would be intitled
" to no more than a moiety of one third of her father's personal
" estate, the defendant *Frances Barker* bringing the leasehold
" houses and the 4000*l.* given her upon her marriage, into
" hotchpot: his Lordship further declaring, that her advance-
" ment was certain, being the said leasehold houses and the
" said 4000*l.* and that by the custom, not the value of the ad-
" vancement is to appear with certainty, but the thing ad-
" vanced; and that the freehold estate settled then upon her
" ought not to be brought into hotchpot, the custom of the
(*a*) Vide ante, 533. Babington v. Greenwood. " city of *London* not having any power over (*a*) lands of inhe-
" ritance; and in case, upon looking into precedents, his Lord-
" ship should not find that the question (whether when the
" widow of a freeman is compounded with or barred before
" marriage from claiming a customary part of her husband's
" estate, and such freeman dies leaving one or more child or
" children, the orphanage part of such freeman's personal estate
" is a moiety, or only a third) hath been fully certified, then at
" the same time his Lordship would, if he should see cause,
" send it to the lord mayor and court of aldermen, for them by
" their recorder to certify the custom in that particular. Also
" that his Lordship would, if he should find cause, likewise
" send it to that court to certify the custom of the city of
" *London*, as to the father's power to compound or make an
" agreement with the daughter before her marriage, touching
" her customary share of his personal estate; and after his
" Lordship should have been attended with precedents, or

"should have the custom of the city of *London* certified in "the points aforesaid, (in case there should be occasion) such "farther order should be made as should be just." † BLUNDEN v. BARKER.

† At length the parties came to an agreement, so that these points were never certified.

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CASE 184.

(Cause by Consent.)

LORD CHANCELLOR PARKER.

10,000*l.* trust money being agreed to be laid out in land, and settled in the common form of marriage settlements, is employed in buying South-Sea stock, and improved to 30,000*l.* As the trust would have suffered by the fall, so shall it have the benefit of the rise of the stock; but the husband wanting 5000*l.* of the 30,000*l.* the court decreed that 15,000*l.* should be taken out; a third of which (viz.) 5000*l.* should go to the husband, as a recompence for his estate for life; and that 10,000*l.* should be laid out in land, to be settled on the first son of the marriage in tail in possession; but to prevent such son's suffering a recovery, the premisses were directed to be settled on the father for life, who was to let the same to the son for ninety-nine years, if the father so long lived.

TEN thousand pounds being given in marriage by the father of the husband and the father of the wife, was agreed to be invested in a purchase and settled on the husband for life, remainder to the wife for life as to part (being 300*l. per annum,*) remainder as to the whole to the first, &c. son in tail male, remainder to the husband in fee, and in the mean time to be placed out on securities, the interest to go as the profits of the land when purchased.

This 10,000*l.* was by consent of the parents and trustees laid out in the purchase of *South-sea* stock, and by the late rise of that stock improved to above 30,000*l.* and it being of a fluctuating nature as to the value, the husband and wife, who had two sons, brought their bill against the trustees, and the father of the husband, and father of the wife, and the infant children, praying that the stock might be sold, the money produced by the sale laid out in land and settled, and that in regard of the great increase, the husband might have 6000*l.* of the money to buy himself a place.

All the defendants by their answer said, they thought it for the benefit of the trust that the *South-sea* stock should be sold, and the several fathers of the plaintiffs did not oppose the husband's having 6000*l.* since all that was agreed or expected to be laid out in a purchase, was but 10,000*l.* and therefore submitted that matter to the court. [649]

This was first heard before the *Master of the Rolls*, and afterwards by the *Lord Chancellor*, who were both of opinion, that

ANONYMOUS. as, if the stock had fallen, the trust must have suffered, so its accidental rise or improvement must be for the benefit of the trust; and therefore that the infant children had a right to the whole capital after the husband's death, the consequence of which was, that he ought not to be permitted to have any of the capital.

But then it was said, that the husband's estate for life was one third in value, if compared to the children's reversion, which made up the remaining two thirds: upon which the matter was thus compromised by consent, and *Lord Chancellor* decreed that the stock should be sold, and out of the money produced thereby, 12,000*l.* should be taken, of which the husband to have one third, *viz.* 6000*l.* to his own use absolutely; but in consideration thereof he should quit his estate for life in the 12,000*l.* which being the remaining two thirds of the 18,000*l.* should go immediately to the children and for their benefit, out of which the husband to have an allowance for the maintenance of them; and in the settlement of the land to be bought with that 12,000*l.* the husband's estate for life to be omitted. But here it being objected, that the eldest son, as soon as he should arrive at twenty-one, would be impowered by a recovery to bar his brother in his father's life-time, and also the father's remainder in fee; to prevent this it was proposed and approved of by the court, that there should be a limitation to the father for life, with re-
[650] mainder as to the land to be bought with this 12,000*l.* to the first, *&c.* son of the marriage; and the father to make a lease for ninety-nine years if he should so long live, in trust for the immediate benefit of the eldest son, by which means the freehold in the father would prevent the son's suffering a recovery in the father's life-time; and the residue of the money arising by sale of the stock, was directed to be invested in a purchase and settled on the father for life, *&c.* according to the agreement. †

Note; In this case the remainder to the first son, though but an estate-tail, to an infant, and so unalienable during such infancy, was valued at two thirds like a remainder in fee; and notwithstanding I mentioned to the court that the life estate (especially in the case where the tenant for life had the remainder in fee) might be valued at two fifths, which had been done in (*a*) some cases; yet the court said how equit-

(*a*) Vide 2 Vern. 267. Pre. Cha. 21. 44.

† By the Register's book the name of this case appears to be *Hubert* v. *Fetherston*, and was decreed the 5th of *April* 1720.

able soever this might be, it was not the practice, for which reason it would be dangerous, and create uncertainty to go out of the rule, and Mr. *Goldsborough*, the Register, said, he had never known a life valued at more than one third. ANONYMOUS.

DE TERM. S. TRINITATIS, 1720. [651]

UPWELL *versus* HALSEY.

CASE 185.

At the Rolls.

10 Mod. 441. 2 Eq. Ca. Ab. 325. pl. 28. 347. pl. 11. One devises that such part of his personal estate as his wife should leave of her subsistence shall go to his sister; devise over good.

JOHN Moorey being possessed of a personal estate of the value of 333*l.* and having a wife and a sister (the plaintiff) but no issue, by will gives 10*l.* to his sister, and directs that such part of his estate as his wife *should leave of her subsistence* should return to his sister and the heir of her body, and appointed his wife executrix.

On the testator's death the wife married the defendant, and afterwards died, upon which the sister sued the defendant the second husband for an account of this personal estate.

First, Against the demand it was objected to have been formerly held, that even a lease for years could not be devised over after a life, much less could a mere personal estate be so limited.

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Secondly, That in this case the widow had a power to dispose of the whole, and her marriage with the defendant was a gift in law and an execution of that power; that equity would not have compelled the widow to give security to the sister not to consume the principal money left by the testator, in regard such intangling devises have a tendency towards a perpetuity.

Sed per cur': This will is indeed ignorantly drawn, but if the court can pick out the meaning of it, that ought to take place. It is now established that a personal (*a*) thing or money may be devised to one for life, remainder over; and as to what as been insisted on, that the wife had a power over the capital or principal sum, that is true, provided it had been ne-

(*a*) See Hyde v. Parrat, ante, 1. and Tissen v. Tissen, ante, 502.

UPWELL v. HALSEY.

cessary for her (1) subsistence, not otherwise: so that her marriage was not a gift in law of this trust-money. (*y*)

Let the Master see how much of this personal estate has been applied for the wife's subsistence, and for the residue of that which came to the defendant the second husband's hands, let him account. (2)

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(1) Vide *Sprange* v. *Barnard*, 2 Bro. C. C. 585. (*z*)

(2) Reg. Lib. B. 1718. fol. 468. entered as of Trinity term, 1719.

(*z*) *Pushman* v. *Filliter*, 3 Ves. 7. *Bull* v. *Kingston*, 1 Mer. 314. *Ross* v. *Ross*, 1 J. & W. 154. *Eade* v. *Eade*, 5 Mad. 118. *Surman* v. *Surman*, ib. 123. *Horwood* v. *West*, 1 S. & S. 387.

(*y*) See *Adair* v. *Shaw*, 1 Sch. & L. 270.

CASE 186.

BROWN *versus* BARKHAM.

2 Eq. Ca. Ab. 530. pl. 9. Mortgagor reserving 6*l.* per cent. with proviso to take 5*l.* per cent. if paid within three months after due; if a great arrear court will not relieve; *secus* if but a small slip of time.

ONE makes a mortgage at 6*l. per cent.* interest, with a proviso to accept 5*l. per cent.* if paid within three months after due. There being a great arrear of interest, the mortgagee sends an account in writing of the sum due to him for interest, computing it at 6*l. per cent.* and the mortgagor returns an answer, allowing the account, desiring forbearance and promising to make satisfaction to the mortgagee for the same.

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Object. This letter signed by the mortgagor, makes the account a stated one; and the interest from thence ought to carry interest, since promising satisfaction upon forbearance can mean nothing else; and as the account sent in, was at the rate of 6*l. per cent.* this promise must be intended of some farther satisfaction beyond that interest: also where the mortgagor admits by writing under his own hand the *quantum* of the interest due, it is as strong as when a Master by his report computes it.

Interest computed by the master's report shall carry interest.

Lord *Parker:* It is true, a Master's report computing interest, makes that interest principal, and to carry (1) interest;

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(1) So *Kelly* v. Lord *Bellew*, 1 Bro. P.C. 202. *Bacon* v. *Clerk*, ante 480.

for a report is as a judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the party's disobedience to the court, in not complying with the time of payment, ought to subject him to interest. But suppose the mortgagor signs an account whereby he owns so much money due for interest, I question whether this will make the interest principal; because of itself it does not shew any agreement or intent to alter the interest, or the nature of that part of the debt, or turn it into principal; neither does it appear to have been ever so determined. I conceive, to make interest on a mortgage principal, it is requisite there should be a writing signed by the parties, for as much as the estate in the land is to be charged therewith; but in the principal case the mortgagor does fulfil his promise, by making satisfaction to the mortgagee for his forbearance, since this proviso obliging the party to pay 6*l. per cent.* on default of paying 5*l.* within three months after due, is generally looked upon as a penalty, and *in terrorem*, and to be relieved against, if only a very short time has happened, though it may not be relievable against in case of a long arrear of interest. However this 1*l. per cent.* is a satisfaction, and a considerable one too.

But where the mortgagor signed an account, whereby so much is admitted to be due for interest, this will not carry interest unless the mortgagor by any letter or writing under his hand agrees to make it principal.

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But the Court at the same time declared, if there had not been such a penalty of 6*l. per cent.* instead of 5*l.* and a great arrear of interest incurred, it would, on such a promise in writing to make a satisfaction for forbearance, have given the mortgagee some allowance in this respect.

Burton v. *Slattery*, 3 Bro. P. C. 68. *Neal* v. *Attorney General*, Mos. 246. *Astley* v. *Powis*, 1 Vez. 496. *Bickham* v. *Cross*, 2 Vez. 471. (*z*)

(*z*) It is not the practice to compute interest upon interest allowed by the report, in any other case but that of a mortgage. See *Car* v. *Burlington*, ante 228. and cases there cited, particularly *Creuze* v. *Hunter*, 2 Ves. jun. 157. 4 Bro. C.C. 157. *Turner* v. *Turner*, 1 J. & W. 47. *Litton* v. *Litton*, ante 541. But interest upon interest will be allowed, where it is so agreed between the parties. *Boddam* v. *Riley*, 2 Bro. C.C. 2. *Macarthy* v. *Llandaff*, 1 Ba. & Be. 375. *Clancarty* v. *Latouche*, ib. 420.

DE TERM. S. MICHAELIS, 1720.

CASE 187. TAYLOR *versus* DULWICH HOSPITAL IN SURREY.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 198. pl. 2. A college restrained by its constitution from making any leases, except for twenty-one years, and at rack-rent, makes orders, recommending it to their successors to renew at less than the rack-rent; this not favoured, as tending to a breach of the statutes.(z)

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7. Sim. 219.

(z) 2. Q. B. 277.

THE hospital or college of *Dulwich* was seised in fee of several lands in right of the college, and the statutes relating to the constitution of it, restrain from making leases of the lands other than for twenty-one years, at the rack rent. In 1696 the hospital made a lease to *John Taylor* the plaintiff's intestate for twenty-one years, under what was then the rack-rent, which was to expire at *Michaelmas* 1717, the lessee had inproved the premisses by building two houses, and at the college audit, which was kept twice a year, every fourth of *March* and fourth of *September*, an entry was made in the register, by which, in consideration that the said *John Taylor* had built two houses on the premisses, and thereby improved the same, therefore it was recommended that at the end of the lease, the college should make him a new lease for twenty-one years at the ancient rent, without raising it; and this entry was signed by the master-warden and most of the fellows. Afterwards when the lease was near expiring, upon the intestate's applying for a new one, the college at the audit held on the 4th of *March* 1716 (the lease being to expire on the *Michaelmas* following) made an order that the intestate should have a new lease of the premisses from *Michaelmas* next, at the old rent, and under the same covenants, as the former; and this order was signed by the master-warden and most of the fellows. The intestate died about the time of the next audit *September* 4, 1717, whereupon the widow having taken out administration, at the audit in *March* following, applied for a new lease according to the order; but being refused, she now brought a bill to compel the college to make her a new lease of the premisses in pursuance of their own order; and *Allen* the master-warden was the plaintiff's principal witness.

It was alledged, that the order for making a new lease to the intestate, did amount to an agreement; and consequently the bill was proper to compel an execution of it.

(z) See *Lydiatt* v. *Foach*, 2 Vern. 410.

TAYLOR v. DULWICH HOSPITAL.

Lord Chancellor: The master-warden (Mr. *Allen*) who appears as a witness in the cause, betrays his trust in relation to the college, and has acted inconsistently with the oath he has taken as warden; neither do I like the recommendation made by the master-warden and fellows to make a new lease to the intestate *Taylor*, at the old rent; it being no less than a recommendation to their successors to wrong the college, and break their statutes, which say, that no lease should be made but at the rack-rents. As to the signing of private persons, namely, the master-warden and fellows, that cannot be such a contract as binds the college; for a contract to bind that (or indeed any corporation, as * to it's revenue) must be under it's common seal. It is true, there would have been some equity, if the intestate had, after this order for a new lease at the old rent, laid out money in improving or building on the premisses, in confidence and reliance on such order. (*y*) However, even in that case he should have had his reparation only from the private persons signing the order, not against the college: as to the repairs done by the lessee since the order for the new lease, these are no more than what by his old lease he was obliged to do; for which reasons dismiss the bill with costs. (*x*)

The signing of any contract for leasing by the master and fellows of the college, unless under the college seal, not binding (*z*) on the college.

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(*z*) See *Winne* v. *Bampton*, 3 Atk. 473. *Macher* v. *Foundling Hospital*, 1 V. & B. 188. *Maxwell* v. *Dulwich College*, 1 Fonb. Eq. B. 1. c. 4. s. 21.

(*y*) *Pilling* v. *Armitage*, 12 Ves. 85. *Marshall* v. *Queenborough*, 1 S. & S. 520.

(*x*) See *Watson* v. *Hemsworth Hospital*, 14 Ves. 324.

SAUNDERSON *versus* CLAGGET.

CASE 188.

DR. *Clagget*, Archdeacon of *Sudbury* in *Suffolk*, commenced a suit in the consistory court of the Bishop of *Norwich*, for the annual sum of 6*s*. 8*d*. as a procuration or proxy due to the archdeacon, for visitations.

In B. R. 1 Stra. 421. Procurations are due of common right for the bishop or (his vicar) the archdeacon's instructing the clergy; and properly suable for in the ecclesiastical court. (*w*)

The libel was by Dr. *Clagget*, archdeacon of the archdeaconry of *Sudbury* in *Suffolk*, in the cathedral church of the

(*w*) *Bishop of St. David's* v. *Lucy*, 1 Ld. Ray. 450.

SAUNDERSON v. CLAGGET.

Holy Trinity in *Norwich*, of the foundation of King *Edward* VI. exhibited against *Saunderson*, as a proprietor or curate of the appropriate rectory of *Aspal* in *Suffolk* (which is within the archdeaconry of *Sudbury*) alledging, that the archdeacon of *Sudbury* was of common right, by endowment, or custom, entitled to the yearly sum of 6*s.* 8*d.* for procurations issuing out of the appropriate church of *Aspal*, and that *Saunderson* the proprietor or curate of that church refused to pay it. Upon which

Saunderson applied to *B. R.* for a prohibition, and suggest-
[658] ed, that this rectory of *Aspal* was time out of mind a rectory impropriate, without any vicar endowed; that all the tithes and profits within this rectory, time out of mind, belonged to the proprietor thereof, who at his own expence used to provide a curate to celebrate divine service in the parish church of *Aspal*.

The court of *B. R.* having granted a prohibition *nisi;* I came to shew cause against it, and urged, that of common right every parochial church pays procurations, or some annual sum in lieu thereof to the ordinary or archdeacon; that accordingly Sir *John Davis* in his *Case of Proxies* (*fol.* 6.) "says, procurations or proxies are as much due to the supe-"rior clergy, the ordinary, or archdeacon (who is the ordinary's "vicar) as tithes are of common right due to the inferior "clergy." That proxies and tithes concur in all points; for 1*st*, as the instruction of laymen is the origin of paying tithes, so the visitation of the ordinary (or of his vicar the archdeacon) which is accompanied with instruction, is also the origin of parsons paying procurations.

2*dly*, That as a layman cannot prescribe in non-payment of tithes, so the parson himself (at least by the common law) cannot prescribe in not paying of procurations. And,

3*dly*, That as unity of possession does not extinguish the right of tithes, so neither does the unity of possession extinguish the right of procurations. The unity of possession as to procurations in Sir *John Davis's Reports* happened in this manner: a proxy of 20*s per annum* was issuing out of an impropriate rectory payable to a religious house, both of them came to the Crown in fee-simple, and this was held only a sus-
[659] pension, and no extinguishment. Now, if the payment of procurations from every parochial church is of common right, then the party contending against common right, ought to come with some affidavit to support his suggestion for a prohibition, (*viz.*) that his impropriate rectory has been held

and enjoyed free from the payment of any procurations, and reputed of right to be so. This is expressly said in Salk. 549. *Godfrey* v. *Lewellin*, where it was declared by *Holt* C. J. that if the matter suggested for a prohibition appears on the † face of the libel, the court will not require an affidavit; but where the matter does not appear upon the libel, in such case the other side ought to have an affidavit of the truth of this suggestion. *A fortiori* ought it to be so in this case, where the matter suggested for the prohibition is contrary to the libel, and against common right. And indeed, if a bare suggestion would do without an affidavit, none could fail of a prohibition, whereby the hands of the spiritual court would (for some time at least) be tied up.

But surely this suit for procurations is proper for the spiri tual court; the duty sued for [procurations] is a spiritual duty; it is claimed by a spiritual person [the archdeacon;] and in this case (tho' an unnecessary ingredient) it is claimed from a spiritual person, the curate of the parish of *Aspal*, who in his suggestion for the prohibition, gives himself the addition of clergyman.

It must be admitted, the manner of this archdeacon's intitling himself by the libel to the procuration of 6*s*. 8*d*. is by several ways, of common right, by custom, or by endowment; and (with submission) every one of these titles is triable by the spiritual court; for as they have cognizance of the principal, so have they the cognizance of the accessary, and that the spiritual court may try a custom relating to an ecclesiastical duty or procuration, or that a pension claimed by a spiritual person by prescription may be sued for in the spiritual court, is held ‡ 1 Vent. 3, 5. 2 Vent. 238, *Williams* v. *Bond*. Salk. 550, *Jones* v. *Stone;* so a *modus decimandi* may be sued for in the spiritual court, and every *modus* must be grounded upon a custom. There is indeed an act of parliament relating to this matter of proxies, the 34 and 35 Hen. 8. cap. 19. which recites, "that several bishops and archdeacons having "pensions and proxies out of religious houses, upon the "dissolution of these religious houses, and on their pos- "sessions being vested in the Crown, such bishops and arch- "deacons had been disturbed in the enjoyment of their "pensions and proxies, notwithstanding the saving in the

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† Ante, 476. *Anonymous* case, where the same rule is said to be observed in chancery.

‡ And *note*, that in 1 Vent. 3. and Salk. 550. Lord *Coke*'s opinion in 2 Inst. 491. to the contrary, is denied to be law.

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" act of dissolution of *the rights of all persons other than the* " *founders;* for remedy whereof it is enacted, that where any " of the bishops or archdeacons have been seised of pensions " and proxies within ten years next before the dissolution of " these religious houses, such bishops and archdeacons shall " recover the same in the spiritual court, with their damages " and costs."

Now this act shows that we are in a proper court, while we are suing in the spiritual court for procurations.

But it may be objected, that it ought to be said in the libel, that this proxy of 6*s.* 8*d.* was paid within ten years before the dissolution of the religious house, to which this appropriate rectory did belong.

[661] To which we answer, that this proxy of 6*s.* 8*d.* is said to have been paid time out of mind, and if so, then it must have been paid within ten years before the dissolution of the abbies, &c.

It may also be objected, that it seems impossible the archdeacon of *Sudbury* could be seised of this procuration of 6*s.* 8*d.* ten years before the dissolution of the religious house to which this appropiate rectory did belong; forasmuch as upon the face of the libel it appears, that this very archdeaconry was founded after the dissolution of the abbies, *viz.* in *Edward* the 6th's time.

Answ. All that appears by the libel is, that the cathedral church of the Holy Trinity of *Norwich* was founded in *Edward* the 6th's time, but the archdeaconry of *Sudbury* might be founded long before†: besides, if proxies were due from all parishes of common right, (as plainly they were) they must consequently be as plainly due and payable to some person or other, to some archbishop, bishop or archdeacon, within whose jurisdiction this church then was, before the foundation of the archdeaconry; and it seems sufficient if the proxy of 6*s.* 8*d.* was payable to some person or other: neither can it be thought that the bishop of *Norwich* claims it, for it is in the bishop of *Norwich*'s own court that the archdeacon sues, so that it is evident proxies are due to somebody in this case, and as evident that no person claims them but the archdeacon; therefore they ought to be paid to him.

[662] But farther, our title in the libel is not laid to be by custom only, but by endowment; and if, as the fact is, and we can

† Of this opinion was Mr. Justice *Eyre*, who cited the dean and chapter of *Norwich*'s case, 3 Co. 73.

prove, that for fifty, sixty, or seventy years, and by ancient books in the Register's office belonging to the archdeaconry, this sum of 6*s.* 8*d.* has been paid; it seems to be good evidence of an endowment, tho' the writing of such endowment be lost; and this title of endowment is properly triable in the spiritual court.

Upon the whole matter, I hope the court will not grant this prohibition.

It is but a small matter in controversy, (6*s.* 8*d.* a year); it is plainly proper for the ecclesiastical court; the nature of the duty is ecclesiastical; it is claimed by an ecclesiastical person; it is also claimed from an ecclesiastical person; for all which reasons it is surely proper to be sued for there.

It being moved again on another day, all the court, *viz.* *Pratt* Chief Justice, *Powys*, *Eyre*, and *Fortescue* Justices, discharged the rule for a prohibition, and delivered their opinions *seriatim*;

1*st*, That this was an ecclesiastical duty, and therefore properly sueable for in the spiritual court.

2*dly*, That it was claimed both *by* and *from* an ecclesiastical person, which made it the stronger.

3*dly*, That though there was an impropriation in the case, still there must be a curate to take care of the souls of the parish; and that curates, as well as other persons, must stand in need of bishops or archdeacons instructions and visitations; consequently,

4*thly*, That the ordinary or archdeacon ought to be allowed for his procuration, what had been usually paid for it, which here appeared to be 6*s.* 8*d.* [663]

5*thly*, That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom, and by their law (*a*) forty years make a custom or prescription.

(*a*) 2 Inst. 649. 653, 654.

6*thly*, That the payment of 6*s.* 8*d.* for 70 or 80 years was an evidence of an immemorial payment; but if it could not, be strictly immemorial, as taking the archdeaconry to have been founded in *Edward* the 6th's time, still since that period, it might become due by endowment, which might in this distance of time have been lost.

Memorandum: In this case a prohibition had been moved for in vacation before the *Master of the Rolls*, who first granted it *nisi causa;* but afterwards upon motion, inclined to think proxies due of common right; and though this proxy

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could not have been due *time out of mind* to the archdeacon of *Sudbury*, if that archdeaconry was founded in *Edward* the 6th's time, yet being due to *some person or other time out of mind*, it might afterwards come by endowment to the archdeacon; and that this was to be presumed from the payment to such archdeacon for seventy or eighty years.

CASE 189.

FORTH *versus* CHAPMAN.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 292. pl. 16. 359. pl. 15.

THIS cause was reserved for the judgment of the *Master of the Rolls*, who, after time taken to consider thereof, gave his opinion (*b*). The case was,

(*b*) 17 Nov. 1719.

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One possessed of a term devises it to *A.* and *B.* and if either of them die and leave no issue of their respective bodies, then to *C.* This held a good limitation to *C.* if *A.* or *B.* left no issue at their death.

One *Walter Gore* by will devises thus: all the residue of his estate real and personal he gave to *John Chapman* in trust only the lease of the ground he held of the school of *Bangor*, for the use of his nephews *William Gore* and *Walter Gore* during the term † of the lease as herein after limited, and having given several legacies, declared his will as to the remainder of the said estate, as well as his freehold house in *Shaw's Court*, with all the rest of his goods and chattels whatsoever and wheresoever, he gave to his nephew *William Gore*; and if either of his nephews *William* or *Walter should depart this life and leave no issue for their respective bodies*, then he gave the said [leasehold] premisses to the daughter of his brother *William Gore*, and the children of his sister *Sibley Price*: upon which the question arose, whether the limitation over of the leasehold premisses to the children of the devisor's brother and sister, was void as too remote?

The court was of opinion that the devise over was void, and said that had the words been, if *A.* or *B.* should die without issue, the remainder over; this plainly would have been void, and exactly the case of *Love* and *Wyndham*, 1 Sid. 450, 1 Vent. 79. 1 Mod. 50.

Now there is no diversity betwixt a devise of a term to one for life, and if he die without issue, remainder over, and a devise thereof to one for life, with such remainder, if he die leaving no issue; for both these devises seem equally relative to the failure of issue at any time after the testator's death;

† In the *Register Book* it is said *termination*.

and for this the court cited and much relied upon 1 Leon. 285. *Lee*'s case, where one devised lands to his second son *William*, and if *William* should depart this life not *having* issue, then the testator willed that his sons-in-law should sell his lands, and died: *William* had issue a son at the time of his death, who afterwards died without issue; upon which it was clearly resolved by the whole court, that though literally *William* had issue a son at his death, yet when such issue died without issue, there should be a sale; for at what time soever there was a failure of issue of *William*, he upon the matter died without issue. And in a *formedon* in reverter or remainder, whenever there is a failure of issue, then is the† first donee, in supposition of law, dead without issue.

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His Honour mentioned the case of *Hughes* and *Sayer*, (*a*) which he himself upon consideration had determined; and said there was a diversity betwixt issue and children, issue (1) being *nomen collectivum;* and also between things merely personal and (2) chattels real; more particularly in the case of *Hughes* and *Sayer*, by the devise over of the money to the survivor, if either of the donees should die without children, the testator of necessity must be intended to mean a death of the donee without children living at his death; for to wait until a failure of issue, might be to wait for ever.

(*a*) Ante, 534.

It being also debated by counsel, where the residue of the

† For which reason, although the first donee had many issues in lineal descent inheritable to the estate tail, and who held the estate, the demandant need not name any of the issues in the clause [*et quæ post mortem, &c.*] but shall say, *et quæ post mortem* of the donee *ad ipsum reverti* or *remanere debet, eo quod* the donee died without issue, 8 Co. 88. a. *Buckmere*'s case.

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(1) The effect of the word "issue" is particularly considered in Lord *Glenorchy* v. *Bosville*, Ca. temp. Talb. 3. *Meure* v. *Meure*, 2 Atk. 265. *Goodtitle* v. *Otway*, 2 Wils. 6. *Roe* v. *Collis*, 4 T. R. 294. (*z*)

(2) So *Pleydell* v. *Pleydell*, post. 750. but this distinction between chattels personal and real is rejected by Lord *Hardwicke*, in *Beauclerk* v. *Dormer*, 2 Atk. 314.

(*z*) And in *Dod* v. *Dod*, Amb. 274, a case of executory trust. *Roe* v. *Grew*, 2 Wils. 322. *Whitelock* v. *Heddon*, 1 Bos. & P. 243. *Murthwaite* v. *Barnard*, 2 Bro. & B. 623. S. C. nom. *Murthwaite* v. *Jenkinson*, 6 B. Moor, 13. 2 B. & C. 357. 3 B. & C. 191. 2 S. & S. 414. n. *Bruce* v. *Bainbridge*, 2 Bro. & B. 123. and 2 B. & C. 357: all the above cases related to real estate. In dispositions of personalty, "*Issue*" when uncontrouled by any words shewing a contrary intent, comprehends all descendants, *Wythe* v. *Thurlston*, Amb. 555. 1 Vez. 196. *Gale* v. *Bennet*, Amb. 681. *Davenport* v. *Hanbury*, 3 Ves. 257. *Freeman* v. *Parsley*, ib. 421. *Sibley* v. *Perry*, 7 Ves. 522. *Leigh* v. *Norbury*, 13 Ves. 344. *Haydon* v. *Wilshere*, 3 T. R. 372.

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term vested, in regard the devise was to *William* and *Walter Gore*: the court declared that the subsequent words increased their interest, and gave the whole term to them, it being

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plainly intended to dispose of and devise away the whole term from the testator's executors; that a devise of a term to one for a day or an hour, is a devise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executors. (*z*)

(*a*) Sab. 25th July.

Afterwards in (*a*) *Trin. Term*, 1720. this case coming before Lord *Parker* upon an appeal, his Lordship reversed the decree; and said, that if I devise a term to *A.* and if *A.* die without leaving issue, remainder over, in the vulgar and natural sense, this must be intended (*b*) if *A.* die without leaving issue at his death, and then the devise over is good; that the word [die] being the last antecedent, the words [without leaving issue] must refer to that. Besides, the testator who is *inops concilii*, will, under such circumstances, be supposed to speak in the vulgar, common and natural, not in the legal sense. (1)

(*b*) Vide ante, Nicholls v. Hooper, 199. and Target v. Gaunt, 432. and Pinbury v. Elkin, 564, 565.

His Lordship likewise took notice that in a *formedon* in remainder, where tenant in tail leaves issue, which issue afterwards dies without issue, whereupon such writ is brought, the *formedon* says †, that the tenant in tail did die leaving issue *J. S.* which *J. S.* died afterwards without issue, and so the first donee in tail died without issue, thus the pleading says, that the donee in tail died leaving issue at his death; consequently the words [leaving issue] refer to the time of the death of the tenant in tail, and if the words of a will can bear two senses, one whereof is more common and natural than the other, it is hard to say a court should take the will in the most uncommon meaning; to do what? to destroy the will.

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2dly, He said that the reason why a devise of a freehold to

† *Quære*, and see the *Register of Writs*, and 8 Co. 88. *a*.

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(1) Vide *Atkinson* v. *Hutchinson*, post. Vol. III. 258. *Goodtitle* v. *Pegden*, 2 T.R. 720. (*y*)

(*z*) So *Doe* v. *Cooke*, 7 East. 269.

(*y*) However refined the distinction between the words "dying without issue," and "dying without *leaving* issue," may be, it is now settled that in bequests of chattels the former words, when uncontrouled, mean a general failure of issue, *Nicholls* v. *Hooper*, ante 198. note 1; the latter, a failure at the death of the party in default of whose issue the bequest over is to take place, *Atkinson* v. *Hutchinson*, post. Vol. III. 262. and cases there cited.

one for life, and if he die without issue, then to another, is determined to be an estate-tail, is in favour of the (*a*) issue, that such may have it, and the intent take place; but that there is the plainest difference betwixt a devise of a freehold, and a devise of a term for years; for in the devise of the latter to one, and if he die without issue, then to another, the words [if he die without issue] cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it.

(*a*) Vide ante, the case of Target v. Gaunt.

3*dly*, His Lordship observed what seemed very material, (and yet had been omitted in the pleadings, and also by the counsel at the bar) that by this will the devise carried a † freehold as well as leasehold estate to *William Gore*, and if he or *Walter* died leaving no issue, then to the children of his brother and sister, in which case it was more difficult to conceive how the same words in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction (2) should be, if *William* or *Walter* died without issue *generally*, by which there might be *at any time* a failure of issue; and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death:* However, *Lord Chancellor* said, it might be reasonable enough to take the same words, as to the different estates, in different (*b*) senses, and as if repeated by two several clauses, (*viz.*) I devise to *A.* my freehold land, and if *A.* die without leaving issue, then to *B.* and I devise my leasehold to *A.* and if *A.* die without leaving issue, then to *B.* in which case the different clauses would (as he conceived) have the different constructions above-mentioned to make both the devises good; and it was reasonable it should be so, *ut res magis valeat quam pereat.* (3)

(*b*) Vide Vol. II. 140. Harris v. Bishop of Lincoln.

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† By the will, as it is stated above, from the Register's books both in the state of the case at the *Rolls* and on the appeal, the limitation over was expressly restrained to the *leasehold;* but in Lord *Macclesfield*'s notes that word is omitted, and the devise over is general. (1) *Vide* 3 Atk. 288

(1) Sed vide 3 Atk. 288.

(2) Vide *Southby* v. *Stonehouse*, 2 Vez. 615.

(3) And this case has been considered as an authority for a different construction of the same words as applied to different subjects, in *Sheffield* v. Lord *Orrery*, 3 Atk. 288. Earl of *Stafford* v. *Buckley*, 2 Vez. 180. Vide tamen *Porter* v. *Bradley*, 3 T. R. 143. (*z*)

(*z*) *Roe* v. *Jeffery*, 7 T. R. 589. In *Crooke* v. *De Vandes*, 9 Ves. 204. Lord *Eldon* observed, with reference to Lord *Kenyon*'s opinion in *Porter* v.

CASE 190. MARSH *versus* EVANS.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 556. pl. 18. One having two sons and a daughter, by will gives to each 2000*l.* payable at twenty-one, provided if assets fall short to pay the legacies, the abatement shall be borne out of the sons' legacies. Testator leaves assets to pay, which the executrix wastes; the daughter's legacy shall have the preference. (*y*)

THE testator having two sons and a daughter, by his will, of which he made his wife executrix, gives 2000*l.* a-piece to his two sons, and 2000*l.* to his daughter, payable at twenty-one or marriage, with a proviso, that if his assets shall fall short for the payment of these legacies, still the daughter shall be paid her full legacy, and that the abatement shall be borne proportionably out of the sons' legacies only. The testator leaves sufficient to pay all the legacies, but the executrix wasted the assets, and by that means only there happened a deficiency.

9. Ves. 203.
19. — 73.
2. Mer. 130.
1. B. & A. 723.

Decreed by the *Master of the Rolls*, that the testator could never intend to make good the daughter's legacy at the expence of the sons, against the wasting of the executrix; that the estate could not properly be said to fall short, the testator leaving assets to pay all his legacies; nor could it be presumed he foresaw his executrix would waste his assets, for then he would not have made her so: wherefore this being a case unforeseen, was unprovided for by the testator, and consequently the daughter ought to abate in proportion.

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But on appeal to the *Lord Chancellor*, this decree was reversed; for that here was a plain preference given to the daughter's portion before those of the sons; and this case was within the words, the estate actually falling short to pay the legacies; that as the testator had not restrained it to any particular means by which the assets should fall short, it must be taken generally, *viz. if by any means* there should be a deficiency; for still the damage was the same to the daughter, whom the father seemed in all events to have provided for with a portion of 2000*l.* His Lordship put this case, suppose the estate had after the testator's death, fallen short through a loss by fire, or by a bad title on which money had been lent, neither of which could have been foreseen by the testator, surely both these accidents would come within the provision of

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Bradley, "I had heard the case of "*Firth* v. *Chapman*, cited for years and "repeatedly by Lord *Kenyon* himself, "as not to be shaken. I never knew "it to be shaken." And see *Daintry* v. *Daintry*, 6 T. R. 307. *Doe* v. *Cooke*, 7 East, 271, note e. *Marshall* v. *Holloway*, 2 Swan. 446.

(*y*) See *Anon.* ante, 495. *Anon.* 1 Salk. 153.

the will, and the daughter should have her full portion of 2000*l.* that it was the same thing as if the testator had said, his daughter's portion should be paid *in the first place;* and the construction which the other side would put on this clause, was to make no distinction where the testator has made a very plain one. Wherefore let both the words and meaning of the will take effect, that is, let the daughter have her full portion, and the abatement be made only out of the sons' legacies.

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ATTORNEY GENERAL *versus* GRANT, RECTOR OF ST. DUNSTAN'S.

CASE 191.

AN information was brought in the name of the Attorney General at the relation of the inhabitants of the *Rolls* liberty, against the impropriator, curate, and overseers of the poor of the parish of St. *Dunstan* in the West, *London,* for an account of charities given by several wills and deeds, to the poor of the said parish; and as the liberty of the *Rolls* was part of the parish of St. *Dunstan,* and the inhabitants of that liberty, on the said parish church being lately repaired, had been assessed, and paid a fifth part towards the repairing thereof, *viz.* 300*l.* out of 1500*l.* therefore it was prayed, that the *Rolls* liberty might have a fifth of all the charities by will or *deed given to the poor of St. *Dunstan*'s, as likewise of the charitable collections made at the door of the church, or at sacraments.

LORD CHANCELLOR PARKER.

Liberty of the Rolls in Middlesex is within the parish of St. Dunstan in the West, London, and contributes a fifth towards the repairs of the said church; but having distinct overseers, and maintaining its poor separately, is not intitled to a share of the charities given by will or deed to the poor of St. Dunstan's, though intitled to a fifth of all collections made at the church doors, or at sacraments.

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It seems the parish of St. *Dunstan,* with regard to such part thereof as is within the city of *London,* has separate officers, both church-wardens and overseers, and maintain their poor separately; in like manner that part which is within the county of *Middlesex,* and liberty of the *Rolls,* hath distinct officers for the poor; but as to the chapel, that only belongs to the *Master of the Rolls,* who *ex gratiâ* gives leave to the inhabitants of the liberty to come there.

Lord *Parker:* Before the statute of the 43 of Eliz. there were no such officers as overseers of the poor; *since* which, as that part of the parish of St. *Dunstan* which lies in *London,* has had distinct overseers, made distinct rates, and maintained

Before the statute 43 Eliz. there were no such officers as overseers of the poor.

ATTORNEY GENERAL v. GRANT.

their poor separately, this makes them as a distinct parish; for which reason, with respect to all gifts of charities by will or deed given to the parish of St. *Dunstan* in the West, that part of the parish which lies in *London,* must have and enjoy the same, exclusive of the *Rolls* liberty; but as to all such gifts, grant or devises *before* the statute of the 43 Eliz. as at that time the parish and liberty were not separated by distinct officers and overseers of the poor, the liberty of the *Rolls* being then part of the parish, shall have a proportion thereof: but the liberty having contributed to the repairs of the church, and being really within that parish, as to all collections of charities at the church door, or at the poor's box, or at the
[671] monthly or other sacraments, which are in part given by the inhabitants of the *Rolls* liberty who have seats in, and repair to the church of St. *Dunstan;* and forasmuch as the inhabitants of the *Rolls* liberty pay towards the parson and lecturer of St. *Dunstan*'s (there being in vacation time no preaching at the *Rolls* chapel) and contribute to the charities of St. *Dunstan*'s: so ought the poor of the *Rolls* liberty (being part of the said parish) to have a proportionable share of those charities; wherefore to the intent it may be seen whether this has been observed, let the dispositions of these last mentioned charities be specified in a book containing the names of the persons to whom given, and for what purpose.

Memorandum: It being said in this case, that as to the charity money given at sacraments, the parson was not bound to distribute it amongst the poor of the said parish, but might bestow it on any object of charity:

Cur': I will not now determine this, though surely if equal objects of charity are to be found within the parish, they in reason ought to be preferred.

CASE 192.

LEIGHTON *versus* SIR EDWARD LEIGHTON.

2 Eq. Ca. Ab. 523. pl. 4. 1 Stra. 404. In case of a trust estate devised to be sold, or devised to *J. S.* if the will be disputed, after two trials in favour of the will, equity will grant a perpetual injunction. (*z*)

THE defendant Sir *Edward Leighton*'s father mortgaged, and afterwards sold the manor of *Balsley* in the county of *Montgomery* in *Wales,* to his brother the plaintiff, and upon his death the now Sir *Edward Leighton* set up an old intail

(*z*) See *Robinson* v. *Byron,* 2 Cox, 4. *Devonsher* v. *Newenham,* 2 Sch. & L. 208.

created about 200 years since, and got into possession; the plaintiff brought an ejectment which was tried in *Wales*, and a verdict passed for the defendant upon producing an old inquisition finding the intail; but there was no deed produced creating this intail. LEIGHTON v. LEIGHTON.

The plaintiff at law brought his bill in this court, setting forth that the writings were all in the defendant's hands, and praying that they might be produced, and that the defendant might not set up a title under any trust-term. Upon which the Lord *Cowper* decreed, that the trial should be upon the *mere right* in an ejectment; and that no trust-term, mortgage or lease should be set up, but that the defendant should make title only under the intail. (*y*) [672]

Accordingly it was tried in *Shropshire*, where, before Mr. Baron *Price*, the now defendant Sir *Edward Leighton* had a verdict: but the Judge certifying against it, a new trial was granted to be at the bar of the *Exchequer*, which was had, and a verdict for the plaintiff: there was afterwards a trial likewise in the *King's Bench*, and a verdict again for the plaintiff. And now on the equity reserved, it was prayed that the plaintiff should have a perpetual injunction with costs.

Lord *Parker*: The plaintiff has no reason to complain (as he does) of the inconvenience, that there is no end of trials in ejectments, for the two first were found against him; but it is true, the two trials at bar which were by the direction of the court, being for him, I do not see what this court has been doing, unless it should now grant (1) a perpetual injunction. If a trust estate be devised to be sold, and on a bill brought against the trustees to sell, the heir contests the will; after two trials, the court will grant a perpetual injunction. In the case of the *Earl of* (*a*) *Bath* v. *Sherwin* the title was a mere legal one, where after several ejectments and five verdicts for the *Earl of Bath*, he brought a bill of peace for a perpetual injunction; the Lord Chancellor *Cowper* thought this too much *for him to grant, but seemed to recommend it to the plaintiff as a cause proper for the House of Lords, and on an appeal, the Lords granted (2) a perpetual injunction, which I take as a reversal of the Lord *Cowper*'s decree, and as a prece- [*673]

(*a*) Pre. Cha. 261. So after several trials in ejectment, and verdicts in all, in favour of the will, equity on a bill of peace will grant a perpetual injunction.

(1) *Barefoot* v. *Fry*, Bunb. 158. (2) 1 Bro. P. C. 266.

(*y*) An injunction in such case will not be granted on *motion* before the hearing of the cause, *Barney* v. *Luckett*, *Northey* v. *Pearce*, 1 S. & S. 419, 420.

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dent in the highest court of what ought to be in this case. Consequently it is very improperly said, that only the House of Lords in such case should grant a perpetual injunction; for that House on appeal gives such a judgment as the court below ought to have done. This court in directing trials, and ordering writings to be produced, has been doing nothing all this while, if it cannot grant a perpetual injunction, which really after so many trials seems to be for the benefit of both parties.

Equity will the rather grant a perpetual injunction where it directs the trial, or where the cause against which the verdicts are found is odious in its nature.

As to the objection, that in the case of the *Lord Bath* v. *Sherwin*, the Lords would not have granted a perpetual injunction, but for its being an odious cause, tending to bastardize a noble person after his death; I answer, it did not tend to bastardize the Duke of *Albemarle*, but to make him the legitimate son of *Radford*. However, the principal case is such as not in its nature to be intitled to any favour; for the defendant Sir *Edward Leighton* is contending against a purchase, under which there has been possession for very many years, against a sale made by his own father to his brother, and is setting up an old intail of about two hundred years standing to defeat this purchase; and if there was not the clearest proof imaginable of such an intail, (as possibly there was not,) the jury were in the right not to find it. It is certainly an inconvenience in the law, that there should be no end of trials in ejectment, and that one trial in a real action (which perhaps may be at a trial by *nisi prius*) should be final, when at the same time twenty trials in ejectment and at the bar in *Westminster Hall* will not be conclusive; but this cannot properly be urged in the present case, when upon the two or three first ejectments the verdicts went against the now plaintiff, who, had they been conclusive, must have been barred.

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But as to the costs in this court, the plaintiff *William Leighton* has had relief by producing the writings, and preventing the defendant from setting up any old terms; and it does not appear that the defendant Sir *Edward Leighton* (the heir of an ancient family) has so far misbehaved, as that he ought to pay costs; though he shall lose his own costs, the right appearing against him; but the plaintiff to have the costs at law for all the trials.

(*a*) March 1720.

The decree was affirmed (*a*) in the House of Lords with 40*l.* costs. (1)

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(1) 2 Bro. P. C. 217, where the proceedings on the different trials are more fully stated, and in which it is said, that the single ground of granting the trial at the bar of the King's Bench was that the defendant should not in a case so long litigated be concluded by *one verdict*.

ATTORNEY GENERAL *versus* HUDSON.

CASE 193.

LORD CHANCELLOR PARKER. 2 Eq. Ca. Ab. 192. pl. 9. Two schools in the same town, one a free-school, and the other a charity school for boys and girls; *A.* devises 500*l.* to the charity school; though both be charity schools, yet only the charity school for boys and girls shall take.

ONE *Penning* of *Saffron Walden* in *Essex*, and several others subscribed to a charity school there of twelve boys and twelve girls, which subscription was only during the pleasure of the benefactors. *Penning* delighted with seeing these charity children, declared he would leave them something at his death; there was also a free school in the same town, and *Penning* made his will giving 500*l.* *to the charity school*, and several pecuniary legacies to his poor relations, and died.

The executors insisted on the want of assets.

Lord Chancellor: Though the free school be a *charity school*, yet the charity school for boys and girls went more commonly by that name; and as the testator was fond of the *latter*, and [675] declared he would leave them a legacy, therefore *that*, and not the free school is entitled thereto; so let the legacy be brought into Court with interest from the end of the year after the testator's death; and in case of a deficiency of assets, let all the pecuniary legacies, as well that to the charity † as others, abate in proportion; for though the *Romans* preferred a pious or charitable legacy to others, yet our law does not: they being all but legacies, and equally intended by the testator to be paid, it would be hard that one of them by being preferred should frustrate all the rest; besides the other legacies being given to several of the testator's poor relations, they are charities also. And because it is objected, that on the failing of the charity school, the charity ought to revert to the founder, therefore in such case I give liberty to the parties to apply again to the court.

Legacy to a charity shall abate in proportion with other legacies, on failure of assets.

† Vide ante 265, *Tate* v. *Austin*, and *Masters* v. *Masters*, 422; but the spiritual Court gives the preference to charity legacies, and in such case Lord Keeper *North* would not enjoin them. Vide 1 Vern. 230. *Fielding* v. *Bond.*

Case 194. POOL *versus* SACHEVEREL.

Lord Chancellor Parker.

Advertisement inserted in the public prints, that whoever shall discover and make legal proof of the marriage in question shall have 100*l.* reward, adjudged a contempt of the Court, and the party procuring it committed.

IN a bill brought touching the real and personal estate of ———*Sacheverel* deceased, who had issue a daughter by his first wife, married to the plaintiff *Pool*, the question was, whether the defendant who before had been Mr. *Sacheverel*'s maid-servant, was married to him?

She admitted by her answer, that she had a bastard by him which was yet living; but before the second child was born she pretended she was married to the said *Sacheverel*, and that they had been married in the prison of the *Fleet*, he by the name of *Robert Marshall*, and she by the name of *Anne How* spinster, and that the marriage was on the 27th of *November*, 1705.

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2. Ru. & Cu. 340.
2. Bea. 132.
11. P. D. 67.
13. — . 75.

In the Spiritual Court it was adjudged to be a good marriage, and that sentence affirmed by the delegates; but the daughter claiming title to a moiety of the real estate, a trial at bar was directed in *C. B.* where the marriage was found; and afterwards the plaintiff's father put an advertisement into the *Daily Courant*, intimating, that whereas there was an entry in the register in the *Fleet* prison, of a marriage there the 27th of *November* 1705, in the words and figures following, (*viz.*) "*Nov.* 27. 1705. *Robert Marshall* of St. *Martin's-lane* in St. *Martin*'s parish, and *Ann How* spinster:" whoever shall discover and legally prove that the said two persons were then married, and before and at the time of the marriage were really called and known by those respective names, shall have a reward for such discovery (on legal proof of the same) of 100*l.* over and above all legal charges to be paid by *Edward Pool.*

And it was now moved that *Pool* should be committed; it having been formerly mentioned before *the Master of the Rolls*, who ordered it to be moved before the *Lord Chancellor*, as being a matter of great moment, concerning on one side, the liberty of the subject, and on the other, the preservation of evidence from subornation and corruption.

The motion being made before *Lord Chancellor*, it was by him adjourned to the next seal, after which at another day the *Lord Chancellor* with great solemnity thus pronounced his opinion:

This tends to the suborning of witnesses, is very dangerous, and not only greatly criminal, but is a contempt of the Court, being a means of preventing justice in a cause now depending, which is aggravated by the marriage having been pronounced good in the court of delegates, and also a verdict at the bar of the Common Pleas in it's favour; and as the Court may, so in justice it ought to punish this proceeding.

It has been objected, that nothing has been done in consequence of this advertisement, no witness come in.

Resp. It does not appear but that some person would come in, were this not discouraged; however the person moved against has done his part, and if not successful, is still not the less criminal.

Object. This is not an offer to any particular person.

Resp. It is equally criminal when the offer is to any, for to *any* is to every particular person. This advertisement will come to all persons, to rogues as well as honest men: and it is a strange way of arguing to say, that offering a reward to one witness is criminal, but that offering it to more than one is not so: surely it is more criminal, as it may corrupt more.

Object. A person coming in for such a reward is no witness, for that his testimony must be rejected.

Resp. It is so of every witness suborned or bribed; he is no witness, if you prove him bribed.

Object. This matter is now over, (*viz.*) the sentence in the spiritual court and the trial.

Resp. It is not over; for suppose, on the reward offered by this advertisement, a dozen affidavits should come in, proving what it desired may be proved, this would probably induce the Court to grant a new trial, and might overturn all the proceedings which have hitherto passed. It is a reproach to the justice of the nation, and an insufferable thing, to make a public offer in print to procure evidence, and is tantamount to saying, that such persons as will come in and swear, or procure others to swear such a thing, shall have 100*l.* reward; and this in a cause now depending here: if 100*l.* is to be allowed, the same reason will hold as to the allowing of 500*l.* or 1000*l.* And tho' the intention of the person so advertising may be innocent, (and I, knowing the man, believe it was so, insomuch that if a court may be said to have inclinations or impressions from thence, I must own, I should be influenced by my knowing Mr. *Pool* to be an honest man:) yet the justice of the Court, nay the justice of the nation being concerned in so public a case, I cannot dismiss the party, tho' his counsel offer to

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POOL v. SACHEVEREL. pay costs to the other side, but in justice, and for example's sake he must stand committed.

2. Vern. & Cr. 697.
2. Vern. & Keen. 645.
10. Sim. 378.
43. Ch. D. 602.

CASE 195.

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CLIFTON *versus* BURT. (1)

Pre. Cha. 540. One dies indebted by bond, and by will gives a legacy of 500*l.* and devises his lands in fee to *J. S.* leaving a personal estate sufficient only to pay the bond; the legatee shall not stand in the place of the bond creditor to charge the land, in regard the land is specifically devised; *secus* if the land had descended to the heir.

A. Seised in fee of freehold lands, and likewise of some copyhold lands which he had *not* surrendered to the use of his will, and indebted by bond in which his heirs were bound, in 1706, made his will, whereby he devised his freehold lands to *B.* in fee, without charging them with any of his debts and legacies, * and gives his copyhold lands to *C.* in fee, in trust to sell to pay his debts and legacies, and having given a legacy of 500*l.* to *D.* died leaving *E.* his executor; *D.* the legatee of the 500*l.* brought his bill for his legacy; upon which Lord *Harcourt* decreed, that as to so much of the personal estate as was exhausted by the bond-debt, the legatee of the 500*l.* should stand in the place of the bond creditor against the land, and that the freehold estate should be liable, in default of personal assets, to pay the legacy.

(1) In Reg. Lib. A. 1720. fo. 76, this case is thus stated. *John Bignold* by will, devised all his estate in *Merrow* and *Stoke*, to his son *John Bignold*, and the heirs of his body, and for want of such issue, to the defendant, *Joseph Burt*, his heirs and assigns for ever, and also devised his copyhold estates which he *had* before surrendered to the use of his will, to his said son *John Bignold*, and the heirs of his body, and for want of such issue, to the defendants *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile*, and their heirs and assigns for ever, (subject to the annuity therein mentioned) to the intent that they or the survivor should sell the copyhold, and apply the money arising thereby to make good and pay his debts and legacies, and he divided the residue between the said *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile*, equally; and further devised to the plaintiff *James Clifton*, 500*l.* within three months after the decease of the testator's said son, if he died under age and not married, in which case he directed that all his personal estate other than what would pay his debts and funeral expences, and the said 500*l.* to the said *James Clifton*, and the other legacies by the will given, should be equally divided between the said *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile* equally, and made *Clifton* and *Joseph Burt*, and two others executors: the son died under age. Upon the original hearing, the court decreed an account of the testator's personal estate, and of the rents and profits of his real estates accrued since his death, and also an account of his debts, and which were debts by specialty, and which by simple contract, and what debts remained unpaid, and also what legacies were unpaid; and the personal estate, and such rents and profits were to be applied in payment of the debts and legacies, so far as the same would extend; and ordered, that for making good the defi-

From this decree the devisee of the freehold lands now appealed to the Lord *Parker*, insisting that the 500*l.* legacy being by the will charged on the copyhold estate, and that fund failing for want of a surrender, the freehold estate which was expressly devised to another person ought not to be liable, and that the land being specifically devised, was not chargeable with a general pecuniary legacy.

Lord *Parker*, having taken time to consider of it, reversed that part of the decree whereby the freehold estate was subjected to (1) the legacy; observing 1*st*, that tho' equity will

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ciency as to what debts and legacies the said personal estate and rents and profits fell short to satisfy, the testator's real estates should be sold to the best purchaser, and in case any of the personal estate had been applied to pay the debts by specialty, the creditors by simple contract and legatees were to stand in the place of the creditors by specialty, and to have satisfaction out of the real estates, so far as the personal estate had been applied in payment of such debts in equal proportion.— With this decree, *Joseph Burt* being dissatisfied, petitioned for a re-hearing. "For "that the administration of the personal "estate in payment of the debts by bond "and simple contract, during the life-"time of *John Bignold*, the son and "tenant in tail, and before the rever-"sion in fee of the said real estate came "to the said *Joseph Burt* in possession, "was a legal administration, and ought "not to be unravelled, marshalled, or "transposed to other purposes, neither "was the reversion in fee of the freehold "expectant on the said estate-tail, assets "to pay debts by specialty before the "determination of that estate-tail, nei-"ther did the said testator subject the "said reversion to the said 500*l.* le-"gacy, which said legacy was also not "payable when the personal estate was "so administered, but was a remote "possibility, and doubtful whether the "same would ever arise, and also for "that such administration of the per-"sonal estate, before the estate-tail de-"termined ought to be allowed as right-"fully acted, and the legacy of 500*l.* "when it became payable, would only "affect such part of the personal estate, "as then remained unadministered, to-"gether with the copyhold estate, which "copyhold only the will subjected to "the legacy, in regard the legacy and "that trust are by the will appointed to "commence together. And for that "the debts by bond and simple contract "are all paid, which did not appear at "the said hearing. And the said de-"fendant conceived that the freehold "lands in his hands as devisee thereof, "ought not to be liable to legacies which "the testator never intended to charge "thereon, and for that the rents and "profits of lands received by an heir "at law, or devisee, before the teste of "the original at law, or the filing a bill "in equity, were not recoverable from "such heir or devisee."— Whereupon his lordship declared, "That the said "decree, so far as directs a sale of the "freehold estate, for satisfaction of the "said legacy of 500*l.* given to the "plaintiff, ought to be reversed, and "that the defendant *Joseph Burt*, "ought to hold the lands according to "the said testator's will."

(1) It being the object of a court of equity, that *every* claimant upon the assets of a deceased person shall be satisfied as far as such assets *can*, by any arrangement *consistent* with the *nature* of the respective claims, be applied in satisfaction thereof, it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund, on which the second has no lien, *Lanoy* v. *Duke of Athol*, 2 Atk. 446. *Lacam* v.

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marshal assets in favour of a legatee, as well as of a simple contract creditor, yet every devisee of land (2) is as a specific legatee, and shall not be broken in upon, or made to contribute towards a pecuniary legacy.

Mertins, 1 Vez. 312. *Mogg* v. *Hodges*, 2 Vez. 53. If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, *so far* as the latter shall have exhausted the personal assets in payment of his debt. *Anon.* 2 Cha. Ca. 4. *Sagitary* v. *Hyde*, 1 Vern. 455. *Neave* v. *Alderton*, 1 Eq. Ca. Ab. 144. *Wilson* v. *Fielding*, 2 Vern. 763. *Galton* v. *Hancock*, 2 Atk. 436. and legatees shall have the same equity as against assets descended. *Culpepper* v. *Aston*, 2 Cha. Ca. 117. *Bowaman* v. *Reeve*, Pre. Cha. 578. *Tipping* v. *Tipping*, post. 730. *Lucy* v. *Gardiner*, Bunb. 137. *Lutkins* v. *Leigh*, Ca. temp. Talb. 54. So, where lands are subjected to payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets, *Haslewood* v. *Pope*, post. Vol. III. 323. So, where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole. *Hyde* v. *Hyde*, 3 Cha. Rep. 83. *Masters* v. *Masters*, ante 422. *Bligh* v. *Earl of Darnley*, post. Vol. II. 620. (*z*) But from the principles of these rules it is clear that they cannot be applied in aid of one claimant so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a *specialty creditor* as against land *devised*, (tho' he shall as against land descended). *Clifton* v. *Burt*, sup. *Hazlewood* v. *Pope*, ub. sup. *Scott* v. *Scott*, Amb. 383. (*y*) but such legatee *shall* stand in the place of a *mortgagee*, who has exhausted the personal assets, to be satisfied out of the mortgaged premisses, though specifically devised. *Lutkins* v. *Leigh*, ub. sup. *Forrester* v. Lord *Leigh*, Amb. 171. for the application of the personal assets in ease of the real estate mortgaged (vide *Howel* v. *Price*, ante 294), does not take place to the defeating of any legacy, *Oneal* v. *Mead*, post. 693. *Tipping* v. *Tipping*, post. 730. *Davis* v. *Gardiner*, post. Vol. II. 190. *Rider* v. *Wager*, ib. 335. and it is to be observed, that none of the rules abovementioned *subject* any fund to a claim to which it was not before subject, but only take care that the *election* of one claimant shall not prejudice the claims of the others, 2 Atk. 438. 1 Vez. 312. So in *Robinson* v. *Tonge*, on 15 *Oct.* 1739, *A.* seised of freehold and copyhold lands, mortgaged the same in his life-time, and died indebted by mortgage, and on several bonds. The specialty creditors insisted, that the Court, in marshalling the assets, should cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate. But the Court said that copyhold estates were not liable either in law or equity to the testator's debts further than he subjected them thereto; and ordered that the copyhold estate should bear its proportion with the freehold estate for payment of the mortgage, and should (*x*) not be liable to make satisfaction for the specialty

(2) So, *Forrester* v. *Lord Leigh*, Amb. 173.

(*z*) *Bonner* v. *Bonner*, 13 Ves. 379. *Norman* v. *Morrell*, 4 Ves. 769.

(*y*) *Keeling* v. *Brown*, 5 Ves. 359.

(*x*) In *Aldrich* v. *Cooper*, 8 Ves. 382. the case of *Robinson* v. *Tonge*, was over-ruled, as being inconsistent with the principles above laid down, the accuracy of which was fully recognized.

2*dly*, That it was a rule, if one gives a specific legacy of a horse, or diamond, and also a pecuniary legacy of 500*l.* to *B.* and there are not assets to pay both, still the specific legatee shall be preferred and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make such specific legatee buy his legacy, against the manifest intention of the testator. [680]

3*dly*, That if a specific personal legatee shall not contribute towards a pecuniary legacy, much less shall a specific devisee of land.

4*thly*, That if in the principal case the testator had devised the 500*l.* to *A.* and a term of 500 years to *B.* without leaving assets to pay the 500*l.* still the specific legatee of the lease ought to prevail, without contributing towards the pecuniary legacy; and if such pecuniary legatee shall not break in upon a specific legatee of a term, *à fortiori* shall he not disappoint the will as to a devise in fee, which is more to be favoured than a devise of a term, in regard it is with more difficulty that a court of equity, in any case, breaks in upon, or charges, a real estate.

Fifthly, That this case was still stronger, where the testator had appointed a fund for the payment of the legacies, *viz.* the copyhold; and tho' that had failed for want of a surrender, the consequence would be, that the fund failing, the legacy must fail also. Indeed the bond creditor might elect to have

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debts. Reg. Lib. B. 1738. fol. 483.—It is now settled, that the Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. *Mogg* v. *Hodges*, 2 Vez. 52. (*w*) *Attorney General* v. *Tyndal*, Amb. 614. (*v*) *Foster* v. *Blagden*, *Hillyard* v. *Taylor*, ib. 704, 713. (*t*)—Where a legacy is given out of a mixt fund of real and personal estate payable at a future day, and the legatee dies before the day of payment, *Quære*, Whether the Court will marshall assets so as to turn such legacy upon the personal estate, (*s*) in which case it would be vested and transmissible, whereas as against the real estate it would sink by the death of the legatee; vide *Prowse* v. *Abingdon*, 1 Atk. 482. *Pearce* v. *Taylor*, Trin. Vac. 1790. before Lord *Thurlow*.—As to the right of a wife to have assets marshalled in respect of her paraphernalia, vide *Tipping* v. *Tipping*, post. 729. (*r*)

(*w*) 1 Cox, 9. S. C.

(*v*) 2 Eden, 207. S. C.

(*t*) *Foy* v. *Foy*, 1 Cox, 163. *Ridges* v. *Morrison*, ib. 180. *Attorney General* v. *Hurst*, 2 Cox, 364. *Makeham* v. *Hooper*, 4 Bro. C. C. 153.

(*s*) It will not, *Pearce* v. *Loman*, 3 Ves. 135.

(*r*) As to marshalling a vendor's lien on the estate for his purchase money, see *Coppin* v. *Coppin*, post. Vol. II. 291.

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his debt out of the assets in the hands of the heir, or of the devisee, but in such case the heir or devisee should have this relief, *viz.* to stand in the place of the bond creditor, and reimburse himself out of the personal estate.

Sixthly, But tho' equity would thus marshal the application of assets, yet would it not do this to disappoint the will of the testator, by breaking in upon the devise of the freehold which
[681] the testator did not intend to charge, but on the contrary shewed his design to charge the copyhold estate therewith.

(*a*) Vide ante, 201.

And *note*, That the decretal order in the case of (*a*) *Hern* v. *Merrick* was produced, whereby it appeared, that Lord *Harcourt* did not then determine this point, but reserved it for farther consideration.

3. Mu. & Keen. 473.
5. Mu. & Cr. 41.

CASE 196.

HARTOP *versus* WHITMORE. (1)

LORD CHANCELLOR PARKER.

Pre. Cha. 541.
2 Eq. Ca. Ab. 772. pl. 14.

ONE by will gives his daughter a portion of 500*l.* afterwards the father marries the daughter and gives her 300*l.* for her portion, and lives four years after the marriage of his daughter without revoking his will.

One devises to his daughter a portion of 500*l.* and afterwards in his lifetime gives her 300*l.* for her portion in marriage, and four years after dies without revoking the will: the husband is a bankrupt; the assignees not intitled to the 500*l.* legacy, nor any part thereof.

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(1) The bill having been dismissed, nothing appears in the Register's book, but the bare order of dismissal,—but from the bill and answer in the six-clerks' office, the case appears to have been this—*John Whitmore* by will dated 14 *October* 1711 (he having at that time four sons and ten daughters) devised considerable real estates to each of his sons—and to every one of his daughters (except *Frances* the eldest, to whom he had given a full portion on her marriage, and his daughter *Dorothy* on whose portion this question arose, and his daughter *Mabell* who had disobliged him by turning Roman Catholick) he gave the sum of 500*l.* if they married with their mother's consent; otherwise, but 300*l.* a piece. He then gave his wife the residue of his personal estate in trust for the performance of his will. He then gave to his daughter *Dorothy* 300*l.* if she should be living at her age of 23 years, and unmarried, or married by and with her said mother's full consent first had and obtained in writing, but if married when it was thereby appointed to be paid her and that without her mother's full consent as aforesaid, then and in such case he gave her 200*l.* only, and that to be paid at her age of 23 years—and he appointed *Sarah Whitmore* his wife sole executrix. It appeared by *Sarah Whitmore*'s answer, that at the time of making the will *Dorothy* was under her father's displeasure and then in *London* with a milliner; but upon *Thomas Young*'s paying his addresses to her, the father and mother were informed of it by a Mr. *Fleming* by letter—that they thereupon offered to give her 200*l.* as a portion and no more—that *Young* for some time refused to marry her without a larger portion, but they were afterwards married without the consent of the father or mother.

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The husband of the daughter becoming a bankrupt, the assignees under the commision bring a bill against the executor of the father for the 500*l.* insisting, that though the father had given to his daughter a portion, yet he might give her a legacy also, as well as a portion; and in this case it was to be the rather intended that the testator designed his daughter should have both, because the portion was less than the legacy. Like the case where a debtor gives a legacy to his creditor which is less than the debt owing to the legatee, this was never held to go in part of satisfaction of the debt; and what made the principal case still stronger was, that the testator survived the marriage of his daughter four years, and all that while never thought proper to revoke his will, which in all presumption he would have done, if he had not intended [682] his daughter should have had both the portion and the legacy. It was likewise observed, that by the statute of frauds a will in writing could not be revoked without writing: wherefore at least the plaintiff ought to recover 200*l.* to make up the portion tantamount to the 500*l.* legacy.

Lord Chancellor, with great clearness: if a father gives a daughter a portion by his will, and afterwards gives to the same daughter a portion in marriage, this, by the laws of all other nations as well as of *Great Britain*, is a revocation of the portion given by the will: for it will not be intended, unless proved, that the father designed (1) two portions to one

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After the marriage upon *Young*'s applying to the father for *Dorothy*'s fortune, the father offered him 200*l.* and the defendant *Sarah* at that time said that if she survived her husband and had it in her power, she would add another 100*l.* *Young* would not then accept the 200*l.* but afterwards wrote a letter to the father for it, who thereupon paid it to Mr. *Fleming* for the use of *Young*, and took a receipt for it in the following words "*Nov.* 10th, 1713. I do ac- "knowledge to have received this day "of *J. Whitmore*, esq. the sum of 200*l.* "to be returned up to *London* and be "paid to Mr. *Thomas Young*, for his "wife's portion. I say received upon "the account and for the use aforesaid "by me *Richard Fleming*." The testator lived two years afterwards without revoking or altering his will.— *Young* became a bankrupt, and *Peter Hartop* his assignee brought this bill against *Sarah Whitmore* the executrix and against *Young* and his wife for the legacy of 300*l.*

(1) *Jenkins* v. *Powell*, 2 Vern. 115. *Elkenhead*'s case (cited) ib. 257. *Ward* v. *Lant*, Pre. Cha. 182. *Farnham* v. *Phillips*, 2 Atk. 216. *Spinks* v. *Robins*, *Shudal* v. *Jekyl*, ib. 491, 516. *Watson* v. *Earl of Lincoln*, Amb. 325. *Grave* v. *Earl of Salisbury*, 1 Bro. C. C. 425. *Ellison* v. *Cookson*, 2 Bro. C. C. 307. (*z*) *Debeze* v. *Man*, ib. 165. 519. (*y*) but the same presumption

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(*z*) 3 Bro. C.C. 61, 1 Ves. jun. 100. & 2 Cox, 220.

(*y*) 1 Cox, 346. *Clarke* v. *Burgoine*, 1 Dick. 353. *Finch* v. *Finch*, 4 Bro.

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child; and as to the objection of his having lived so long after giving the portion to his child on her marriage, without ever revoking that part of his will, there could be no need for the father to revoke that legacy which he before had done by giving the portion in his life-time, since that would be but revoking the same will twice. And this demand is the harder, inasmuch as it is made by the assignees of the commissioners of bankruptcy against the husband; so that the wife, whose portion this is said to be, would be never the better for it.

Dismiss the bill with costs.

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does not arise in the case of a *stranger*. *Powell* v. *Cleaver*, 2 Bro. C.C. 499. (*x*)

C. C. 38. & 1 Ves. jun. 534. *Trimmer* v. *Bayne*, 7 Ves. 508. *Hartopp* v. *Hartopp*, 17 Ves. 184. *Monck* v. *Monck*, 1 Ba. & Be. 298. *Thellusson* v. *Woodford*, 4 Mad. 420.

(*x*) *Brown* v. *Peck*, 1 Eden, 140. and for this purpose the father of a natural child is considered, *primâ facie*, as a stranger to his son. *Ex parte Pye*, 18 Ves. 140. *Wetherby* v. *Dixon*, 19 Ves. 407. & Coop. 279. The advance of a portion is not an ademption of a bequest of a share in the *residue*, *Smith* v. *Strong*, 4 Bro. C. C. 493. *Freemantle* v. *Banks*, 5 Ves. 79; and see *Robinson* v. *Whitley*, 9 Ves. 577.

1. Rus. Husk. 194.
(94). 2. Ch. 237.

CASE 197.

LORD CHANCELLOR PARKER.

HEATH *versus* PERCIVAL. (*z*)

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1 Stra. 403. 2 Eq. Ca. Ab. 167. pl. 14. 630. pl. 2. *A.* and *B.* partners in a goldsmith's trade, are bound in a bond to *J. S.* *A.* and *B.* break off the partnership and divide their stock; *J. S.* the obligee in the bond knows this, and that *A.* took upon him to pay the debts, and after a great distance of time brings a bill against the executors of *B.* yet he (*J. S.*) shall recover.

SIR *Stephen Evans* the goldsmith, and his partner *Percival*, were bound in a bond to the plaintiff for the payment of 1000*l.* and interest, and this so long since as 1693, in which year the money was employed in the partnership trade. In the same year *Percival* * being very ill in health, they broke off partnership, when Sir *Stephen Evans*, by ready money and his own bond, secured to *Percival* his share of the partnership stock, and took upon himself all the partnership debts, giving his covenant to secure *Percival* from all such debts: the same year *Percival* died, leaving one *Samuel Percival* his executor, and the defendant his residuary legatee.

Public notice was given to all the creditors of the joint-

(*z*) See *Rees* v. *Berrington*, 2 Ves. jun. 542.

stock, that they were either to receive their money, or to look on Sir *Stephen Evans* only as their pay-master.

In 1708 the plaintiff *Heath* came to Sir *Stephen* and called in his money, but then continued it upon Sir *Stephen*'s subscribing the bond at 6*l. per cent.* Sir *Stephen* continued solvent until 1711, and the plaintiff till that time, might, when he pleased, have had his money. The plaintiff outlawed *Samuel Percival* the executor, and brought this bill against the defendant *Peter Percival* the residuary legatee, to recover the 1000*l.* and interest out of the assets of *Percival* the co-partner, Sir *Stephen Evans* having in 1711 become a bankrupt and insolvent.

Obj. This is not a proper cause for the plaintiff to come for relief in equity, when he has put an hardship on the defendant; he might have had his money for the space of—— years, during all which time Sir *Stephen* was in full credit, but for the gain of 6*l. per cent.* he has continued his debt in Sir *Stephen*'s hand, after which length of time, and when the defendant has accounted with Sir *Stephen*, delivered up all his vouchers, given a general release, and can have no remedy against Sir *Stephen* (he being a bankrupt): now the plaintiff comes for aid in equity against him on this bond, all which is [684] made still harder on the defendant's part, as he was in other respects a great loser by Sir *Stephen*'s bankruptcy.

Lastly, It was said that the plaintiff's altering the interest on the bond from 5*l.* to 6*l. per cent.* was an alteration of the security, and consequently the defendant no longer liable.

Lord Chancellor: The defendant's testator being bound in the bond, he must lie at stake until the bond be paid, and though the plaintiff continued the money on the bond, this was not material, since it was upon the credit of both the obligors. And as to the notice given by Sir *Stephen* to the joint creditors to bring in their securities, and that Sir *Stephen* alone would be hereafter liable, that being *res inter alios acta* could not bind the plaintiff; and his changing the interest did not alter the security, for still it was the bond of both; but the defendant could not be liable to more than 5*l. per cent.* for the arrear of interest. (1)

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(1) Vide *Jacomb* v. *Harwood*, 2 Vez. 265. (*z*)

(*z*) *Ex parte Ruffin*, 6 Ves. 119. *Ex parte Harris*, 1 Mad. 583. *Devaynes* v. *Noble*, *Sleech*'s case, 1 Mer. 539. *Waugh* v. *Carver*, 2 H. Bl. 235.

HEATH *v.* PERCIVAL.

Whereupon the plaintiff had a decree for his debt, interest and costs.

Where an executor in trust was outlawed, and a witness proved he had enquired after, and could not find him, not necessary to make him a party.

Note; In this case the executor in trust was outlawed, and a witness proved that he had inquired after, but could not find him, which was thought to be a full answer to the objection that such executor was not made a party.

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DE TERM. S. HILLARII, 1720.

CASE 198. THROGMORTON *versus* CHURCH. *(In Domo Procerum.)*

2 Eq. Ca. Ab. 222. pl. 3. Suing the bail below pending a writ of error in parliament, is a contempt and breach of privilege.

IN debt on escape brought by *Church* against *Throgmorton*, sheriff of *Bucks*, *Church* the plaintiff in *C. B.* had a verdict and judgment, whereupon the defendant *Throgmorton* brought error in *B. R.* and one *Mead*, an attorney of *Aylesbury*, was his bail, but judgment being there affirmed, error was brought in the House of Lords, and pending the writ of error there, *Church* the plaintiff below took out execution against *Mead* the bail, and seized all his goods upon a *fi. fa.* *Mead* petitioned the House of Lords against the attorney that took out this execution, alledging it to be a contempt and breach of privilege; whereupon counsel were heard before the committee of privileges, and objected that this was no breach of privilege or contempt; because the writ of error in the House of Lords only staid all proceedings upon the record of the judgment against the principal; whereas the recognizance given by the bail was a distinct record; and if it had been intended to stay proceedings against them upon this record,

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they must also bring their writ of error in parliament; it was compared to the case of two bound in a bond jointly and severally for the same debt, in which judgment is first had against one, and afterwards, in another action, judgment is also obtained against the other obligor, who brings error, still the former obligor may be sued upon the judgment against him, though it be but one debt; and if this was a contempt here, or if matters were staid by means of the writ of error

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brought by the defendant in the original action, then restitution ought to be made in *C. B.* where the *fi. fa.* was taken out, and the goods seized; whereas this had been attempted, and been spoke to by counsel before the Judges of *C. B.* to whom complaint had been made of this as of an irregular execution; but they held it to be regular, (as Mr. Justice *Tracy* himself informed me.)

On the other side it was insisted, this was a contempt; that if execution had been taken out against the plaintiff in error, pending the writ of error in the House of Lords, it had been plainly a contempt, and in the present case they had in effect been doing the same thing, by taking the very debt in question out of the pockets of the bail, which could amount to no less than to a taking it from the principal, who (at least by an implied promise of law) was liable and compellable to indemnify the bail; that the writ of error most plainly suspended the original plaintiff's right to the debt, it being thereby *sub judice* whether there was any debt or not; and it was unreasonable that the plaintiff below should be allowed to take out execution for a debt before it was determined whether there was any such debt; for in case the judgment should be reversed, the plaintiff below ought not to have execution thereon; and if the principal was discharged of the debt, the bail must be so too, who could only be liable, in respect of the debt incurred [687] by his principal; and therefore it was absurd to suppose the latter to be in a worse condition than the former.

Whereupon it was *resolved*, that this was a contempt and breach of privilege, and the plaintiff's attorney ordered to make a restitution of the goods, which was accordingly done; but the Lords, being informed that the Judges held it no contempt at law, spared the costs in this case as to the attorney who sued out the execution, upon his returning to *Mead*, the bail, all the goods he had taken from him.

Debt against the sheriff for an escape of one in execution on an outlawry after judgment, may be brought either in the tam quam, or at the suit of the party only.

Afterwards the writ of error itself came to be argued; where the only point insisted upon for the plaintiff in error was, that this action of debt on the escape against the defendant the sheriff, was when the defendant in the original action in *C. B.* had been outlawed upon an outlawry after judgment, and such defendant had upon this judgment been taken in execution, the sheriff had let him escape, for which the action was brought against him, and a verdict and judgment obtained. Under these circumstances it was said, that the action being brought for this escape on an outlawry after judgment, ought to have been brought in the *tam quam*, (*viz.*) *tam pro domino*

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rege, quam pro seipso; and I being of counsel in the House of Lords for the plaintiff in error, argued as follows:

One *Joan Church* (the plaintiff in the original action and defendant in error) had recovered judgment in debt in *C. B.* against one *John Merridale* for 21*l.* and after judgment *Church* (the plaintiff below) outlawed this *Merridale*, and sued out a special *capias utlagatum* against his body, lands, and goods, directed to the defendant, then sheriff of the county of *Bucks*.

[688] As to lands or goods *Merridale* had none; and as to his body, the defendant took that in execution upon the *capias utlagatum*; but it was a body (one would think) scarce worth taking, being quite worn down with age, near eighty years old, and almost starved with poverty. It seems the sheriff (a thing in a poor man's case not very usual) had compassion for him, and shewed him some favour, for which the now defendant *Church* hath brought debt for an escape against the sheriff, and had the good luck to obtain a verdict and judgment thereupon in *C. B.* for 131*l.* being the whole debt, and on error brought in *B. R.* that judgment was (without argument) affirmed.

To reverse these two judgments is this writ of error now brought before your Lordships. It being after a verdict, I shall forbear to mention the several mistakes in the declaration, for being so in form only, I doubt they are cured by the verdict; but I apprehend there is a mistake in substance, I mean, as to the nature of the action brought in the plaintiff's name only, whereas it ought to have been as well on behalf of the King, as the plaintiff, *tam pro domino rege, quam pro seipso*. It appears by the declaration, that *Merridale* was outlawed after judgment, that he was taken upon a *capias utlagatum*, and that while he was in custody upon this *capias*, the sheriff let him escape. Now by the party's being outlawed, all his personal estate and the profits of his lands are forfeited to the King; and the writ of *capias utlagatum* is a writ at the King's suit; upon which when the sheriff has taken the party, he is the King's prisoner as well as the plaintiff's; and when the sheriff lets him escape, it is a contempt to the King, and a wrong to him as well as to the plaintiff; therefore this action for the escape ought to be at the suit of the King as well as

[689] the party, which is agreeable to the reason of the law, and likewise to the precedents.

If the prisoner taken in execution upon a *capias utlagatum* be the King's prisoner as well as the party's (as plainly he is), it seems reasonable, that for the escape of such prisoner, the

action should be brought as well on behalf of the King as of the plaintiff.

1*st*, For that by this escape the King as well as the plaintiff loses his prisoner; and if the sheriff's permitting his prisoner taken upon this *capias utlagatum* to escape be a wrong to the King as well as to the plaintiff, then it is reasonable that the action brought for this wrong should be on behalf of the King as well as the plaintiff.

2*dly*, As the sheriff's suffering the prisoner to escape is a contempt to the King as well as a damage to the party, it is proper that the action be as well *pro domino rege, quam pro seipso*.

3*dly*, As the writ of *capias utlagatum* is at the King's suit, so it is proper, for conformity's sake, that the action for the escape grounded upon it be on the King's behalf as well as on the party's.

In former times it was so far from being doubted whether such action for an escape of a prisoner taken on a *capias utlagatum* should not be brought as well on behalf of the King as of the party, that, on the contrary, it was a doubt whether the plaintiff in such case could have any action at all in his own name. I say, it was formerly questioned, where a defendant was taken upon a *capias utlagatum*, and the sheriff let the defendant escape before such time as the plaintiff had entered any prayer, or elected that the defendant should be in execution at his suit, whether in such case the plaintiff could bring an [690] action for the escape of such prisoner, in regard it was both the King's suit and the King's prisoner; and (I think) *Garnon*'s case, 5 Co. 88. was the first wherein it was resolved, that the plaintiff might have such action against the sheriff upon the escape of one taken on a *capias utlagatum*; but still it must be intended that the action be brought as well on behalf of the King as of the party. I must admit, that as this action, upon which the outlawry is grounded, was at the suit of the party, as it is carried on at the charge of the party, as the King receives advantage from it, being by that means intitled to the forfeitures accruing by outlawry: so the party is to receive some benefit by the suit of the King, and therefore is to be first paid his debt out of the goods and chattels of the defendant who is outlawed. But even this has been held by very learned men to be at first *ex* (*a*) *gratiâ regis* and not *de jure*, vide *Yelv.* 19. by *Popham* Chief Justice. Neither can it be objected, that it is not necessary the action should be brought on behalf of

(*a*) Vide Vol. II. 270. the same said by Lord Commissioner Gilbert.

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the King as well as the party, because the latter is to recover damages; for,

There are many cases in the law, where the party is to recover all the damages, and yet the action must be brought *tam pro domino rege, quam pro seipso.* Thus in an action of (*a*) *scandalum magnatum* for speaking scandalous words of a peer of the realm, or of any of the great officers of this kingdom, the action is to be brought *tam pro domino rege, quam pro seipso,* and yet the party in this case recovers all the damages. So in an action against the hundred upon the statute of (*b*) *hue and cry* for a robbery, tho' the party plaintiff recovers all the damages, yet is the action to be brought as well on behalf of the King as of the party. In Cro. Jac. 134. *Waterhouse* v. *Bawd,* it is laid down as a rule by the court, "that [691] "where a statute prohibits a thing and adds no penalty, an "action lies against the party for acting contrary to the pro- "hibition of the statute, but that it ought to be *tam pro do-* "*mino rege, quam pro seipso,* because in such case the King is "to have a fine." And if it be a reason why the action ought to be *tam pro domino rege, quam pro seipso,* in case where the King is intitled to a fine, then such rule must hold in the present one; for here it is a contempt in the sheriff, who has taken the defendant upon a *capias utlagatum,* to permit him to escape, he being the King's prisoner, and taken at the King's suit, for which contempt the sheriff is liable to be fined.

(*a*) 2 Rich. 2. c. 5. 12 Rich. 2. c. 11.

(*b*) 13 Ed. 1. c. 1. 27 Eliz. c. 13.

Thus according to the reason of the law, this action ought to be brought *tam pro domino rege, quam pro seipso;* nay, the case seems to be within all those reasons which require such an action.

And now as to precedents, I shall cite only two, but those such as did not pass *sub silentio,* being adjudged on the very point, where upon a defendant's being taken on a *capias utlagatum,* and the sheriff's suffering him to escape, an action was brought against the sheriff *tam pro domino rege, quam pro seipso,* for that escape: to which it was objected, that the action ought to be only in the name of the party: but the objection was over-ruled, and the action adjudged to be rightly brought, forasmuch as the *capias utlagatum* was the King's writ, issued out at his suit, and the King to have the benefit thereof as well as the party. Cro. Jac. 533. *Parkhurst* v. *Powel.* The other authority where it was so adjudged upon the like debate, is in 1 Roll. Rep. 78. *Barret* v. *Winscomb,* and Cro. Jac. 360.

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In the next place, your Lordships will give me leave to observe, that the action is in its nature a pretty hard one, (*viz.*) to charge one man with the debt of another, to make the sheriff responsible for the debt of his prisoner. Indeed there was a time when the law in this point was much more unreasonable than it now is, when it was held, (and for a long time it was so held) that where the sheriff had suffered one in execution to escape, the plaintiff, who by his having once taken the defendant in execution was at the end of his suit, could not † retake him, tho' *suffered* by the sheriff to escape: but since the law is now construed to be otherwise, and the plaintiff may again take the defendant in execution, unless he himself consented that his prisoner should escape; it seems pretty hard that in all events, when the sheriff suffers the prisoner to escape, he should be charged with the whole debt; and it is so much the harder in this case, where the prisoner had no estate either real or personal, was quite worn down with age, and almost starved with poverty; besides that he died within a few days after the pretended escape, and had he died in prison, the plaintiff would not have had the least advantage.

The plaintiff below has been so much in haste to carve out satisfaction for himself, that he would not vouchsafe to stay for the justice of this house, but proceeded against the bail below, and took his goods in execution, even pending the writ of error in Parliament, which your Lordships, with great justice, resolved to be a contempt and breach of privilege of this House; notwithstanding which, the plaintiff has not thought fit to make the bail any satisfaction for the great costs and damage which he put him to by this erroneous execution.

Upon the whole, we humbly insist, that this action for the escape of the prisoner taken upon a *capias utlagatum* ought to be *tam pro domino rege, quam pro seipso,* 1*st,* because the prisoner that is suffered to escape is the King's prisoner; 2*dly,* [693] because by the sheriff's permitting the prisoner to escape, the King is damnified as well as the party; 3*dly,* as by reason of the sheriff's suffering this escape, there is a contempt to the King, as well as an injury to the party; 4*thly,* for that by this escape the sheriff is liable to answer, as well a fine to the King, as the debt to the party; 5*thly,* this case is within all those reasons that require an action to be brought *tam pro*

† Vide Hob. 202. Denied to be law, 1 Vent. 4. 269.

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domino rege, quam pro seipso; and *lastly*, upon the strength of the authorities which have been cited to your Lordships, we hope that this action for the escape, because not brought as well on behalf of the King, as of the party, is erroneous, and that therefore the judgment ought to be reversed.

But on debate the judgment was affirmed, and chiefly on the authority of the case of *Moore* v. Sir *George Reynolds*, Cro. Jac. 619, 620. where in an action for an escape of a prisoner who had been taken on a *capias utlagatum* after judgment, and the action being brought at the suit of the party only, it was objected that it ought to have been in the *tam quam;* but in that case the prothonotaries certifying that the precedents had been both ways, the objection was disallowed.

CASE 199.

ONEAL *versus* MEAD.

At the Rolls. 2 Eq. Ca. Ab. 556. pl. 19. One having mortgaged his fee-simple estate, devises his leasehold to A. and his fee-simple to B. and dies, leaving no other personal estate. The devisee of the fee-simple must take it *cum onere*, and shall not charge the leasehold estate specifically devised with the mortgage.

ONE seised of a real estate in fee, which he had mortgaged for 500*l.* and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife.

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1. Rep. Thyk. 633.
2. ——— . 538.
(94). 3. Ch. 252.

The question was, whether there being (as usual) a covenant to pay the mortgage monies, the leasehold premisses devised to the wife should be liable to discharge the mortgage?

Obj. The personal estate is the natural fund for debts, and according to the decree made by his *Honour* in Sir *Peter Soame*'s case, where the father the mortgagor dying intestate, and leaving a mortgage upon his real estate made by himself, the personal estate was applied to pay off the mortgage, whereby the younger children were left destitute: so by the same reason, in this case, the leasehold, though specifically devised to the wife, yet being personal estate, must be liable to pay the debt due by the mortgage; especially in favour of the heir, who otherwise would be very slenderly provided for, and in a worse condition than his younger brothers.

But the *Master of the Rolls*, after taking time to consider of it, and being attended with precedents, decreed that as

ONEAL v. MEAD.

the testator had charged his real estate by this mortgage, and on the other hand specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy (1) by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premisses were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended. That by such construction (*a*) each devise would take effect, (*viz.*) the leasehold estate go to the devisee thereof, and the heir enjoy the freehold, though subject to the burden with which the testator in his life-time had charged it; and this resolution did not in the least interfere with that of *Clifton* and *Burt* (*b*), because in the latter there was no mortgage.

(*a*) See the case of Long v. Short, ante 403.

(*b*) Ante 678.

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(1) So, *Tipping* v. *Tipping*, post. 730. *Rider* v. *Wager*, ib. 335. *Chaplin* v. *Davis* v. *Gardiner*, post. Vol. II. 190. *Chaplin*, post. Vol. III. 367.

DE TERM. PASCHÆ, 1721.

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HOLDITCH *versus* MIST.

CASE 200.

LORD CHANCELLOR PARKER.

One of the late directors of the South-Sea company owes money which is recovered against him at law; though all his estate is taken from him by the late act, and provision made for his creditors, yet the court denied an injunction.

THE plaintiff having been one of the late directors of the *South-sea* company, was sued at law for 800*l.* he having taken that sum of the defendant for 400*l. South-sea* stock, which he had (as he affirmed) put into the subscription books in the name of one Mrs. *Peck*, whereas upon search in all the books it did not appear that there was any sum whatsoever set down in the name of *Peck*; upon which the defendant *Mist* brought an action against the plaintiff, as for so much money received for the defendant's use, and obtained a verdict. The defendant at law now brought his bill, and moved for an injunction, urging that in regard the late (*c*) act had vested all his estate in the trustees for the *South-sea* company, and made a provision for the payment of his debts (being late a director) out of his estate, the defendant *Mist* ought to repair to the trustees; that it would be extremely hard to permit

(*c*) 7 Geo. 1. c. 28.

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Vide ex parte James, ante 610.

the plaintiff at law to take out execution against the body of his debtor, when the legislature had disabled him from paying any of his debts, and provided another method for that purpose; and that it was like the case of a bankrupt, where the court had not only granted an injunction, but also released the bankrupt, who, after having given up all his estate, and submitted to be examined, had yet been arrested by a peevish creditor.

But the *Lord Chancellor* refused to grant an injunction, saying, there was nothing of this act of parliament disclosed in the pleadings; or if there was, yet that the act was not made in favour of the late directors. However afterwards by consent, the present trustees of the *South-Sea* company paid the debt in question, out of the allowance made by the act to the plaintiff *Holditch*. (1)

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(1) Vide *Hornby* v. *Houlditch*, cited in *Ludford* v. *Barber*, 1 T. R. 93. and *Auriol* v. *Mills*, 1 H. Bl. 433, and 4 T. R. 94. The case of *Holditch* v. *Mist*, has also been applied in argument to those which have lately arisen respecting *American* Loyalists, sued in this country by *American* creditors. *Kempe* v. *Antill*, 2 Bro. C. C. 11. *Wright* v. *Nutt*, 1 H. Bl. 136. and 3 Bro. C. C. 326. *Folliot* v. *Ogden*, 1 H. Bl. 123. and 3 T.R. 726. (*z*)

(*z*) In *Wright* v. *Simpson*, 6 Ves. 714. Lord *Eldon* recognized the authority of the principal case, and expressed doubt as to the soundness of the decision in *Wright* v. *Nutt*.

2. Russ. & Myl. 669.

CASE 201. Mr. PHIPPS (SON OF SIR CONSTANTINE PHIPPS) *versus* EARL OF ANGLESEA.

LORD CHANCELLOR PARKER.

5 Vin. Abr. 209. pl. 8. 2 Eq. Ca. Ab. 220. pl. 1. 754. pl. 3. A general act of pardon, though with an exception of contempts, extends to pardon contempts in marrying infant wards of a court of equity.

THE plaintiff married the only daughter of the late Earl of *Anglesea*, to whom by the marriage settlement and the will of her father, 15,000*l.* was secured, (*viz.*) 12,000*l.* by the settlement, and 3000*l.* by the will, payable at her age of eighteen or marriage. The whole was charged on the late Earl's *Irish* estate; but the settlement and will being made in *England*, and all parties living here, the money was decreed to be paid into court with *English* interest, (*a*) and without deducting the charge of the return from *Ireland*. (2)

(*a*) Vide Vol. II. 88. Wallis v. Brightwell.

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(2) The decree directed the portions of 12,000*l.* and 3000*l.* to be raised on the *Irish* estate, and in the mean time *by consent* the same was to carry interest

PHIPPS v. EARL OF ANGLESEA.

But the plaintiff having married the young lady, without the privity of the committee, the Lady *Elizabeth Gayer*, to whom she had been committed by order of court, the *Lord Chancellor* declared, that this did very nearly touch the honour and justice of the court, and observed how very unequal the laws of the land were in making it felony to steal my horse, and not felony to inveigle and gain my daughter without my consent; wherefore he ordered all parties to be examined upon interrogatories touching the manner of gaining the marriage, and notice of the order of commitment. (*y*)

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" However, the general (*a*) act of pardon coming afterwards, tho' with an exception " of all contempts and offences for " which any prosecution was then depending, and which had " been prosecuted at the charge of any private person or " persons :"

(*a*) 7 Geo. 1. c. 29. § 23.

Per Cur' : This offence or contempt ending only in the punishment of the party offending, and not in relieving or redressing the prosecutor, is pardoned.

Memorandum, The *Lord Chancellor* made the like determination in the cause of *Kiffen* v. *Kiffen*, where a young infant girl of great fortune was committed to the care of a tradesman in *London*, a linen-draper, after which a younger son of the committee married her, and a woman who had been one of the most active instruments in bringing about this marriage, being big with child, and near her time, the hearing of the complaint was put off until such person was brought to bed, and in the mean time came out an act of general pardon, which was held to extend to this offence. So in Dr. *Yalden*'s case, (who was suspected to have encouraged the infant Duke of *Beaufort*'s going from his committees the Dukes of *Grafton* and *Portland*, under whose care he had been placed by the Court of Chancery) this offence or contempt was likewise held to be pardoned by the same act.

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at 5 *per cent*, and no allowance was to be made for returning the money from *Ireland*. Reg. Lib. B. 1720. fol. 71.— As to the interest, which legacies given by a will made in *Ireland*, the *West Indies*, &c. shall carry, vide *Saunders* v. *Drake*, 2 Atk. 465. *Pierson* v. *Garnet*, 2 Bro. C. C. 38. *Malcolm* v. *Martin*, 3 Bro. C.C. 50. (*z*)

(*z*) *Connor* v. *Bellamont*, 2 Atk. 382. *Raymond* v. *Broadbelt*, 5 Ves. 199. *Bourke* v. *Ricketts*, 10 Ves. 330. *Cockerell* v. *Barber*, 16 Ves. 461.

(*y*) See *Nicholson* v. *Squire*, 16 Ves. 259. *Warter* v. *Yorke*, 19 Ves. 451. *Ball* v. *Coutts*, 1 V. & B. 292. *Wade* v. *Broughton*, 3 V. & B. 172.

Case 202.

DOCTOR DAVIS'S CASE.

Lord Chancellor Parker.

2 Eq. Ca. Ab. 754. pl. 2. Committee of an infant heiress having given a recognizance conditioned that he should not suffer the infant to marry without the consent of the court; the form of this recognizance moderated, viz. "That the infant shall not marry with the committee's privity without the consent of the court."

(*a*) See the case of Judge Eyre v. Lord Shaftsbury, Vol. II. 102.

AN infant heiress was committed to the custody of Dr. *Davis*, who was a person of a very good estate, and the course of the Court being that such committee shall enter into a (*a*) recognizance with two sureties, conditioned that he *should not permit or suffer the infant to marry without the consent of the Court;* Dr. *Davis* had been already indulged so far, as that the Court ordered his own single recognizance to be taken without sureties; and now the Doctor petitioning that the recognizance might be made different from the common course, (*viz.*) to be bound that the infant heiress should not with the *consent, privity, or connivance of the Doctor,* be married to any person without the consent of the Court; it was urged to be unreasonable that the recognizance should be otherwise penned, or that an honest committee should be liable to the forfeiture of his recognizance, or be undone, if a rash infant would without the privity of his guardian steal a marriage; for at this rate a guardian, without any default in him, might forfeit his recognizance; and as the Court would not in such case order the recognizance to be sued, so to encourage an honest guardian to act, it would be but just to have this explained in manner as desired; especially as the petitioner in the present case was a gentleman of a very good character and estate.

Mr. *Talbot contra:* The course is to enter into a recognizance not to suffer the infant to marry without the consent of the Court; and if the ward, without the privity or default of the guardian, steals a match, the committee is safe in the justice of the Court from having his recognizance put in suit; so that the doctor is now mistrusting the justice of the Court, whose settled forms are not to be altered to please the humour of any person; besides if the forms are to be altered in favour of Doctor *Davis,* they must by the same reason be liable to be altered at the request of any other committee. With respect to the doctor's character, surely every committee is taken by the Court to be a fair and honest man, otherwise it would hardly have intrusted him with the guardianship: but farther, as this is the constant form of recognizances in such cases, so is it founded on good reason, since it might be very difficult to prove that the committee was privy or consenting to the marriage, though in fact he really were so.

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Lord Chancellor: I would be very tender of altering the settled forms of the Court to satisfy a capricious humour; but this case differing in its circumstances from the common one, and as I allowed the alteration of the form of the recognizance in favour of Mr. *Lacy*, to whom I lately committed an infant heiress, so let this be altered in the same manner, (*viz.*) that the infant shall not be married without leave of the Court, by the consent, privity or connivance of the committee.

DAVIS'S CASE.

Forms of the court not to be altered to gratify a capricious humour.

DE TERM. S. TRINITATIS, 1721. [700]

BAGWELL *versus* DRY. (1)

CASE 203.

***J. S.** inter al'* bequeathed the surplus of his personal estate unto four persons equally to be divided between them share and share alike, and made *A. B.* his executor in trust. One of the four residuary legatees died in the life of the testator, after which the testator died; and the question being, to whom the fourth part devised to the residuary legatee (who died in the life of the testator) should belong?

LORD CHANCELLOR MACCLESFIELD.

2 Eq. Ca. Ab. 344. pl. 3. 440. pl. 38.

One devises the surplus of his personal estate to four equally, and leaves *J. S.* executor in trust. One of the four dies in the life of the testator; his share, as so much of the testator's estate undisposed of by the will, shall go according to the statute of distribution.

The *Lord Chancellor*, after time taken to consider of it, did this day deliver his opinion, that the testator having devised his *residuum* in fourths, and one of the residuary legatees dying in his life-time, the devise of that fourth part became void, and was as so much of the testator's estate (*a*) undisposed of by the will; that it could not go to the surviving residuary legatees, because each of them had but a fourth devised to them in common, and the death of the fourth residuary legatee could not avail them, as it would have done, had they been all joint legatees, for then the share of the legatee dying in the

2. Tr. Hkeen. 2 1913. 2. Ch. 3.

(*a*) See the case of Lord Bindon v. Earl of Suffolk, ante 96.

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(1) Reg. Lib. A. 1720. fol. 365.

BAGWELL v DRY. (a) Show. 91. Salk. 238.

life of the testator, would have gone to the survivors. (a) But here the *residuum* being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them. (1)

His Lordship farther declared, that this share could not go to the executor, he being but a bare executor in trust, and consequently, that it must belong to the testator's next of kin, according to the statute of distribution, as so much of the personal estate remaining undisposed of by the will, and that as to this the executor was a trustee for such next of kin. †

† See this case cited in *Farrington* and *Knightly*, Pre. Cha. 567. But the report there is not warranted by the register's book.

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(1) So, *Page* v. *Page*, post. Vol. II. 489. *Man* v. *Man*, 2 Stra. 905. *Owen* v. *Owen*, 1 Atk. 494. *Peat* v. *Chapman*, 1 Vez. 542. *Akeroyd* v. *Smithson*, 1 Bro. C. C. 503. So, where the bequest is *revoked* as to one residuary legatee. *Cheslyn* v. *Creswell*, 6 Bro. P. C. 1. (z)

(z) 2 Eden, 123. S. C. *Androvin* v. *Poilblanc*, 3 Atk. 300. *Ackerman* v. *Burrows*, 3 V. & B. 54. *Skrymsher* v. *Northcote*, 1 Swan. 566.

2. Russ Myl. 643.

CASE 204. 1892 3 Ch. 39

LORD WENMAN'S CASE.

LORD CHANCELLOR PARKER.

Where the husband was a lunatick, the wife, tho' an Irish Peeress, committed for not producing him.

A Commission was granted to enquire of the ideocy or lunacy of the Lord *Wenman*, and upon the meeting of the commissioners, they who had him in their custody were desired to produce him, but being refused, the *Lord Chancellor* made an order for the producing of Lord *Wenman*. Whereupon, after great delays, and after the Lady *Wenman* his wife had been ordered to attend, and it also appearing by affidavits, that she had been with her husband, and been instrumental in removing him from place to place, in order to evade his being produced:

The *Lord Chancellor* ordered the Lady *Wenman* to be committed to the Fleet; saying it was great imprudence, as well as obstinacy in her, not to do what she could for the producing her husband, who upon the affidavits that had been made, could not but be thought a lunatic; for if he were found so, his wife must have the commitment of his person, and also an allowance made her suitable to the estate and greatness of his

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quality; and it not being pretended that the Lord *Wenman* was an ideot *à nativitate*, his estate must be all accounted for; and the personal estate would upon his death without children, go one moiety thereof to her. That the taking of this account would save the estate from embezilment, to the benefit of his family, and where there was such a presumption of lunacy, the wife, though otherwise under the power of the husband, might well be supposed to have him under her power.

LORD WENMAN'S CASE.

2dly, *His Lordship* observed, that it would be a scandal to the Court if this matter, (*viz.*) the contempt of not producing the Lord *Wenman*, were not punished after so long time given for that purpose; also an intolerable hardship, if the prosecutor of this commission, after so many delays and so long an expectation, should be without remedy; not to mention the reflection it would bring on the justice of the Court, which his Lordship said should not *die* in his hands; and though he did this with great reluctance, in respect of the quality of the person whom he committed, yet since the justice and honour of the Court were so immediately concerned in this matter, it was of absolute necessity.

Note; Afterwards a jury, by inquisition found the Lord *Wenman* a lunatick, and the custody of his person was granted to his wife, she being discharged from her commitment.

4. Myl & Cr. 682. 1908. a. c. 98.
1. 617.

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THE DUKE OF BEAUFORT *versus* BERTY.

CASE 205.

THE late Duke of *Beaufort* by his will appointed *James Berty* and *Doddington Grevill* esquires, guardians of his two sons, the present Duke and his younger son the Lord *Noel Somerset*; and upon a petition by the Duke and Duchess of *Grafton*, and the Duke and Duchess of *Portland*, (being near relations of the present Duke of *Beaufort* and his brother the Lord *Noel*, both infants) praying that the Lord *Noel*, who at this time went to *Westminster* school, might be removed to *Eton*, I objected, that the two guardians being appointed so by the will of the late Duke, until these noble infants should

LORD CHANCELLOR MACCLESFIELD.

Guardians appointed by will according to the statute of 12 Car. 2. c. 21. have no more power than guardians in socage, and are but trustees, on whose misbehaviour, or giving occasion of suspicion, the Court of Chancery will interpose. (1)

(1) Vide Harg. Co. Litt. 88. b. notes 12, 13, 14, 15, 16. (*z*)

(*z*) 2 Fonb. Eq. B. 2. Part 2. c. 2. s. 1.

DUKE OF BEAUFORT v. BERTY.

come to the age of 21, were *in loco parentis,* and had the parental authority delegated over to them by the father's will, who by the statute of 12 Car. 2. cap. 24. had as much power to dispose of the guardianship of his children, as by the statute of 32 H. 8. a man hath to dispose of his lands; that the two guardians desiring that the Lord *Noel* should continue at *Westminster* school, until he was fit to go from thence to the university; and this being also the desire of his father the late Duke, it was submitted, whether the Court would interpose in this case. That indeed, formerly, when, Mr. *Grevill,* one of the guardians, certified that he thought it proper, upon Lord *Noel*'s first coming to *Westminster* school, and being much indisposed in his health, to remove him from thence, and while the two guardians differed (the other guardian Mr. *Berty* being against his removal,) it was reasonable that the great † seal,

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which has a superintendency over all infants, should interpose; else there would be a failure in the due education of the infant; but when both the guardians had agreed that *Westminster* school was the properest school for Lord *Noel,* it was hoped the Court would not send him to *Eton.*

It was admitted, that in case the guardians should misbehave, the Court might interpose, upon a presumption, that the testator himself would not have intrusted the guardians with this power, had he foreseen they would have abused it.

Upon which Lord *Macclesfield,* with some warmth, said, that the guardians were (*a*) but trustees, and that the statute, by enabling the father to devise the guardianship of his children, did no more than impower the father by will to chose a different person from him or her that would have been guardian in socage; a different person than what the law would have appointed, and to continue that guardianship to a different time than the guardianship in socage would have continued, (*viz.*) until twenty-one instead of fourteen. But that still a guardian appointed according to the statute, had no more power than a guardian in socage; and as the court could interpose where there was a guardianship in socage so might it also do in a case of a guardian by the statute (*z*), both being equally

(*a*) See the case of Frederick v. Frederick, post. 721.

† One devised the guardianship of his child to his wife and *A.* but if his wife should marry again, then the wife and *A.* to fix upon another guardian: the wife did marry again, but would not agree with *A.* to choose another guardian. Resolved, that it devolved upon the Court of Chancery to appoint a guardian. *Darcy* v. *Lord Holderness, Trin.* 1725, by Lord *King.*

(*z*) *Curtis* v. *Rippon,* 4 Mad. 462. *Wright* v. *Naylor,* 5 Mad. 77.

trustees; that suppose one should devise lands to trustees to sell for such a price as they should think fit, for payment of debts, there could be no doubt but that this court, at the desire of any single creditor, might and would interpose, and order the estate not to be sold as the trustees should think fit, but for the best price before the master; and as the Court would interpose, where the estate of a man was devised in trust, so would it *à fortiori* concern itself, on the custody of a child's being [705] devised to a guardian, who was but a person *intrusted* in that case, since nothing could be of greater concern than the education of infants, and more especially of this noble lord, in whom the publick was interested, and from whom his prince and country might justly have expectations. As to what was said of a guardian's being *in loco parentis*, the solicitor general replied, that there was a diversity betwixt a natural parent and guardian, for that if the latter was for marrying a ward under his quality, it was most usual for this court to interpose; but not so in case of a father's endeavouring to marry his infant child to one beneath him.

But *Lord Chancellor* said, this court, would and had interposed, even in the case (1) of a father, as where the child had an estate, and the father, who was insolvent and of an ill character, would take the profits, there the court has appointed a receiver, as was done in the case of *Kiffin* v. *Kiffin*. Likewise in answer to the objection that the court should not interpose until the guardians have misbehaved; *his Lordship* observed, that *preventing justice* was to be preferred to *punishing justice;* and that he ought rather to prevent the mischief and misbehaviour of guardians, than to punish it when done. That if any wrong steps had been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians, (as there were in this case) or if the guardians chose to make use of methods that might turn to the prejudice of the infant, the court would interpose

This Court will interpose, if guardians give occasion to suspect their behaviour.

(1) So *Butler* v. *Freeman*, Amb. 302. and Lord *Thurlow* expressed himself to be very clearly of this opinion in *Cruise* v. *Hunter*, Reg. Lib. A. 1789, fol. 457. (*z*)

(*z*) 2 Cox, 242. And see *Ex parte Warner*, 4 Bro. C. C. 101. *Wilcox* v. *Drake*, 2 Dick. 631. *De Manneville* v. *De Manneville*, 10 Ves. 52. See too, *Eyre* v. *Shaftesbury*, post. Vol. II. 103.

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and order the contrary; and that this was grounded upon the general power and jurisdiction which it had over all trusts, and a guardianship was most plainly a trust.

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But it appearing that Lord *Noel* was recovered in his health, and had made a considerable progress in the school, and that a new method of instructing him might retard his learning: the Court suspended that part of the order which had been before made for removing him from *Westminster* to *Eton*, the *Lord Chancellor* acquainting his Lordship, that while he behaved himself well and regularly at *Westminster* (which it was not doubted but he would do) he should stay there; but if otherwise, the Court would remove him to *Eton*.

Also the guardianship of the infant Duke being devised to Mr. *Berty* and Mr. *Grevill*, until his Grace should come to age, and it being recommended to the guardians to take the advice of the late Duke of *Ormond* in the education of the infant; I objected, that if the Duke of *Ormond* had been naturally dead, this restraint had been at an end; and it seemed to be the same, the Duke of *Ormond* being attainted, which was a civil death.

Guardians are recommended by will to act with the advice of J. S. and J. S. is attainted, this superintendency devolves upon the great seal.

But the Court said, this shewed that the education of the infant Duke was not to be merely at the discretion of the guardians; and there being a disability in the Duke of *Ormond*, it devolved on the great seal as the general guardian of all infants; wherefore it was directed that in all cases touching the education of the infant Duke, the guardians should apply to, and advise with, the Duke and Duchess of *Grafton*, the Duchess being the aunt of the infant Duke, and likewise with the Duke and Duchess of *Portland*, who were his near relations. And Mr. *Berty* the guardian desiring the Duke might return to *Oxford* where he had been for some time, the court referred him to the two noble Dukes abovementioned, for their thoughts upon the matter.

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CASE 206.

SANDYS *versus* SANDYS.

LORD CHANCELLOR MACCLESFIELD.

SIR *Richard Sandys*, on his marriage with *Mary* the daughter of the lady *Rolle*, in consideration of the marriage, and of 5000*l.* portion, by indentures of lease and release, dated the 11th and 12th of *April* 1698, settled lands of the value of

2 Eq. Ca. Ab. 643. pl. 13.

A reversionary term sold for the raising a daughter's portion.

587*l. per annum* in the county of *Kent*, to the use of himself for life, remainder, as to part of the premisses (amounting to 500*l. per annum*), to his intended wife for her life as a jointure, remainder to the first, *&c.* son of the marriage, in tail male, remainder to trustees for 500 years, *sans waste*, in trust to raise portions for daughters, the same to be raised by sale or mortgage, or by rents, issues and profits, (*viz.*) 5000*l.* if but one daughter, 6000*l.* if more than one, and to be paid at the daughters' age or ages of twenty-one, or marriage, if after fourteen, or under, if with the consent of the mother and two other persons if then living; with power for Sir *Richard Sandys* to make a jointure of 150*l. per annum* on a second wife, and in the deed there were lands of 187*l. per annum* in *Yorkshire*, settled on Sir *Richard* and his heirs. Sir *Richard* had issue four daughters and no son by his first wife, and on her death married again.

SANDYS *v.* SANDYS.

The eldest daughter after her age of fourteen married the plaintiff, who brought this bill for the raising of his wife's 1500*l.* (being a fourth part of the 6000*l.*) in the life-time of her father. On hearing of the cause, the scantiness of the estate being insisted upon, and that it would be greatly detrimental to sell or mortgage the reversion in the life of the father, especially as the daughters had other provisions left them by their grandmother; and that this matter of trust was entirely in the discretion of the court: it was referred to a master, to state the value of the estates comprised in the settlement.

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And the case coming on afterwards (*a*) before the *Lord Chancellor*, it was urged on behalf of the plaintiff, that the trust being to raise portions by mortgage or sale, payable at marriage, if after the age of fourteen; and the daughter having before her marriage attained that age, her portion ought, by the express words of the deed, now to be raised by sale or mortgage of the term; that the intention of the trust was to have the portions raised so as that the daughters might be preferred in marriage at seasonable times, and not wait until the father's death, when they might be upwards of forty or fifty, and past the proper age for marriage; that this appeared the more reasonable in the present case, forasmuch as the father had received 5000*l.* portion with the mother, and was but to add 1000*l.* to it, which the interest of 5000*l.* would in a little time produce, and several precedents in point were cited, (*viz.*) *Greaves* and *Madison*, T. Jones 201. *Corbet* and *Maidwell*, Salk. 159. *Gerrard* (*b*) and *Gerrard*, *Stanyforth*

(*a*) January 26, 1721.

(*b*) 2 Vern. 458.

SANDYS v. SANDYS. (a) 2 Vern. 460.

(a) and *Stanyforth*, and particularly lord *Allington*'s case, where a reversion was sold for payment of daughters portions, which fell into possession within a short time after the sale. That the mortgaging the reversion could be no prejudice to the father; for whether there was a mortgage or not, still the portion must carry interest, and the estate be charged therewith from the time of its becoming due.

Also there being a proviso in the deed, that the portions or any part thereof should not be raised until they became due, this was said to be an argument of the intention of the parties, that when they became due they should be raised.

[709] *Lord Chancellor:* The selling or mortgaging reversions seems a great hardship, being in effect to ruin a family for the raising of daughters' portions; and therefore I will not go one step farther, than precedents shall force me. This method cannot fail of tempting daughters to disobedience towards their fathers, and encouraging improvident marriages. Had the portion been intended to be raised by sale of the reversionary term in the father's life-time, it should (and in my opinion would) have been so expressed. By the same reason that a reversionary term may be sold for the raising daughters' portions, so may it be for the raising portions for younger children by virtue of the common clause in marriage settlements to that purpose; which would be ruining an heir at law for the sake of younger children. The intention seems to have been against any sale or mortgage, until such time as the trustees could take the profits; the word [profits] standing in opposition to the words [sale or mortgage;] and the case of the mother's leaving daughters, which should claim their portions against their father, does not appear to have been within the view of those who made the settlement.

But at length (*animo reluctante*) *his Lordship* decreed that the trustees should sell or mortgage a fourth part of this term of five hundred years (subject to the father's power of making a jointure upon his second wife) for the raising a portion of 1500*l.* and interest from the marriage; saying that though this was a matter of trust, yet since all the contingencies had happened, and nothing remained to suspend the execution of such trust of the term, and it did not evidently appear but that the parties intended the portions should be raised out of the reversionary term; therefore he did not look upon it to be within the discretion of the court, any more than in the option of the trustees, whether they would or would not raise the money; but said it was a thing not to be encou-

raged. That as to what had been objected of the daughters having other provisions left them by their grandmother, he did not think that material; for if they had a right to their portions by the settlement, they ought not to lose that right by another relation's kindness in leaving them a farther provision. (1)

SANDYS v. SANDYS.

(1) Vide *Butler* v. *Duncombe*, ante, 448.

FREDERICK *versus* FREDERICK.

CASE 207.

THIS bill was brought by *Leonora Frederick*, widow, for the performance of her marriage agreement.

LORD CHANCELLOR MACCLESFIELD.

1 Stra. 455. One for a valuable consideration contracts to be a freeman of London, but dies before he has taken up his freedom; his personal estate shall be divided as if he had been a freeman, but his children not to be city orphans.

Thomas Frederick esq. son of Sir *John Frederick* knt. late Lord Mayor of *London*, in *January* 1674, applied to marry the plaintiff *Leonora*, one of the daughters of *Charles Maresco*, who was an orphan of the city of *London*, (being daughter of a freeman;) and the marriage being agreed upon between the relations on both sides, Sir *John Frederick*, by indentures of lease and release, settled divers houses of 330*l. per annum* to the use of *Thomas Frederick* (his son) for life, remainder to the plaintiff *Leonora* his intended wife for life for her provision, remainder to the first, *&c.* son of the marriage in tail male, remainder to trustees for 1000 years for daughters' portions if no issue male.

And by another deed of the same date, the sum of 6500*l.* which was Sir *John Frederick*'s money, and also 600*l.* computed to be the residue of the plaintiff *Leonora*'s portion (beyond 5000*l.* which Mr. *Frederick* the husband was to receive) was assigned over in trust to be laid out in a purchase, and to be settled on Mr. *Frederick* the then intended husband for his life, remainder to the plaintiff *Leonora* the intended wife for her life, with remainder to the first, *&c.* son of the marriage. [711]

Afterwards and before the marriage, the plaintiff *Leonora* being an orphan, and consequently the licence of the Court of Aldermen (who are guardians of the city orphans) being necessary to the marriage to avoid being liable to commit-

FREDERICK *v.* FREDERICK.

ment, application was made to the Court of Aldermen for their consent: whereupon an entry was made at a special court held the 15th of *February* 1674. No. 22. "That at "this court licence is granted to *Leonora Maresco*, one of the "daughters and orphans of *Charles Maresco* late citizen "and ——— of *London* deceased, to marry *Thomas Frederick*, "esq. son and heir apparent of Sir *John Frederick*, knt. and "alderman, provided that Mr. Common Serjeant do approve "of the settlement made upon the said orphan, and signify "the same to this Court." And the said Sir *John Frederick*, did there promise and engage, that if the settlement should not prove satisfactory to the common serjeant, and to the court, that he would make up and enlarge the same to the satisfaction of the court; and the said Mr. *Frederick* being thereunto required, did promise and engage, and the said Sir *John* did also undertake on his behalf, to take up his freedom of the city within one year next ensuing.

No. 22. At the same Court it was agreed, "that when any "person not free of the city should address themselves to the "court for a licence to marry any orphan of the city, "they should be first required and urged by the Court to take "up their freedom, before the court would give consent to such "marriage."

[712] No. 23. At the same Court upon the humble desire of Mr. *Thomas Frederick*, son of Sir *John Frederick*, knight and alderman of *London*, and *grocer*, being capable of freedom by patrimony, but desiring to be admitted by redemption into the company of ——— it is ordered by this Court, "that he "shall be admitted to the freedom of this city by redemption "in the said company of ——— he paying to Mr. Cham-"berlain for the city's use 3*s.* 4*d.*"

Mr. *Frederick* performed no part of the agreement, either in taking up his freedom, or in laying out the trust money in a purchase.

March 15, 1680, at the Court of Aldermen (No. 24), upon some debate had touching Mr. *Frederick*, who had married one of the daughters of *Charles Maresco* deceased, and had not taken up his freedom of the city according to his promise made to the said court, at the time when he had licence to marry, whereby she, in case she survived him, would not be entitled to the thirds of his personal estate, in like manner as the widows of freemen were; it was by the said court referred to Mr. *Recorder* and Mr. *Common Serjeant*, to peruse and consider of the settlement made upon the said orphan; as also

the marriage agreement, and to see if the same were made according to the direction and intention of the Court, and Mr. *Frederick*'s promise, and to certify to the Court how they found the same, with their opinions therein. At which last court Sir *John Frederick* sat as *locum tenens* for Sir *Patience Ward* the lord mayor.

Mr. *Frederick* had two sons and three daughters, and by his will dated the 20th of *May* 1718, gave to his eldest son *John* 1000*l.* to his second son *Thomas* 1000*l.* to his three daughters 1000*l.* each. and 10*l.* to his wife; and devised such [713] part of his real estate as was unsettled to his second son *Thomas* in tail, but gave the bulk of his estate to his three grandsons, being the children of his second son *Thomas Frederick*; after which the testator died.

His widow now brought her bill, insisting that her husband having made the agreement *ut supra*, for a valuable consideration, (*viz.*) that of marriage, and to induce the court of aldermen to consent to his marrying their orphan, he ought to be taken as a freeman, and in consequence thereof, his personal estate to be distributed as such (*viz.*) the widow to have one third, his children another third, and only the remaining third to pass by the will.

The Lord Chancellor, after debate of this case at the bar, took time to consider of it; and this day (being the 25th of *August* 1721,) decreed the personal estate of Mr. *Frederick* to be liable to the custom of *London*, and that he should be taken as a freeman of *London*, he having for a valuable consideration agreed to become such.

The demand is grounded upon this rule, that where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done; and that the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he agreed to. This is to be taken as a contract made by the Court of Aldermen with Mr. *Frederick* himself; and now the question is, whether he shall by will give away his personal estate, contrary to his own agreement? When Mr. *Frederick* engaged to take upon himself the freedom of the city, it was the same as if he had agreed that the personal estate which he might die possessed of should [714] go according to the custom of the city of *London*, one third to his widow, and another third to his children.

Object. This is no part of the marriage agreement, there being on that occasion solemn deeds, one, a settlement of lands, and another of money to be laid out in lands, said *to*

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be a provision for the wife, in which no mention is made that the widow or children should have the benefit of the custom of *London.*

Resp. It may be admitted that this was the agreement, and all the agreement that was made between the parties, (*viz.*) the relations on the man's and on the woman's side. But still there were other parties to be consulted, who were guardians of the infant, as being a city orphan; and the agreement between the relations could no ways bind the court of aldermen, being no more than a bare *proposal* as to them. If the court of aldermen had been parties to the agreement, it had been something, but they were not, it was *res inter alios acta,* and however it might conclude the relations, cannot conclude the court of aldermen who were guardians of city orphans, and without whose leave no man can marry such orphan, under pain of imprisonment: when the agreement betwixt the relations was brought to the court of aldermen, and laid before them as a proposal, (for it could be no more) that court might have rejected the whole, altered any part, or have required an addition to it; and this matter being before the statute of frauds and perjuries, had the agreement been by parol only and without any writing, it had notwithstanding been good.

[715] But did the court of aldermen agree to this proposal of the relations made with regard to the settlement on this marriage?

No, they did not; they insisted upon something farther; so that these settlements were an agreement by those who had no authority: whereas they, who had the authority and were guardians of the orphan, did not agree, but made other additional terms, that Mr. *Frederick* should take upon him the freedom of *London,* in order to entitle his wife and children to the benefit of the custom; and these additional terms are complied with by Mr. *Frederick* and his father Sir *John, i. e.* Mr. *Frederick* the son and Sir *John* the father on behalf of the son, do agree that he shall become a freeman of *London* within a year then next ensuing: which agreement being entered among other the proceedings and orders of the court of aldermen, and that court being a court of record, is become matter of record; it is as much so as a fine would be if levied there; for it is the concord between the parties; and to prevent every thing which might look like taking advantage of Mr. *Frederick* in gaining this agreement from him after his affections were settled upon the young lady, therefore Sir *John Frederick* the father is made party thereto, and

undertakes the performance on behalf of his son. So that there can be no doubt of the agreement's being made by Mr. *Frederick* and his father, that it was part of the marriage agreement, made in consideration of the marriage, and of the court of aldermen's giving their consent to Mr. *Frederick*'s marrying their orphan, to whom they were a political guardian; it appears to have been made upon a full and valuable consideration, and consequently ought as near as may be to be performed.

But it is objected on the other side, 1*st*, That this agreement is not made for the benefit *of the wife and children,* but of the *city,* that Mr. *Frederick* who was rich by marrying a city orphan entitled to a considerable fortune, and was the son and heir apparent of a very wealthy citizen who had been lord Mayor, should bear the burthen of the city offices; which might be for the honour and ease of the city. [716]

Resp. This is a strange and monstrous construction, that while the court of aldermen are doing not only an honest act, but an act of justice in making terms for the benefit of the orphan, this should be interpreted as self-interest and knavery, in taking care to help themselves to proper persons for supplying their burdensome offices. If such self-interested and dishonest view had been entertained by some of them, still the rest could not have been presumed to come into it; but supposing it to have been the intent of some of them it was presently afterwards forgot, or rather appears never to have been their intent; for by a subsequent order of a court of aldermen, where Sir *John Frederick* the father was *locum tenens* of the then lord mayor, it was taken notice of, that Mr. *Frederick* was not become a freeman, whereby the orphan *Leonora Frederick* would lose her thirds (which shews that the intent of putting Mr. *Frederick* to accept of his freedom, was that his wife might have her thirds,) and it was therefore referred to the recorder and common serjeant of the city, to see what provision had been made for Mrs. *Frederick* the orphan.

Object. The court of aldermen referred it to the common serjeant to approve of the deeds of settlement made by Sir *John Frederick* upon his son's marriage, and it is to be presumed, that the common serjeant did approve of them, which deeds are said to be a provision for the wife, but mention nothing of Mr. *Frederick*'s agreement to take up his freedom of the city. [717]

Resp. It should seem as if only the *validity of the deeds of settlement,* and *not the value of the estate settled,* were referred

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to the common serjeant; for as to the value, the court of aldermen could as well judge of that as the common serjeant; neither is it proper or usual for counsel to give their opinion upon the value of estates, which is no matter of law. But admitting that both the validity and the value of what was settled were intended to be referred to the common serjeant, yet the agreement of Mr. *Frederick* to take up his freedom, was an additional part of the provision insisted upon by the court of aldermen and submitted to by Mr. *Frederick*.

Object. If the benefit accruing to the wife and children by the freedom of the city was part of the agreement and the intent thereof, why was there a year's time given to Mr. *Frederick* to take up his freedom, which might have been done in a day? And there being the delay of a year, Mr. *Frederick* might have died within that year, by which means the advantage intended to accrue to the wife or issue by such freedom, would have been lost.

Resp. It might be reasonable to allow Mr. *Frederick* some time to take up his freedom, but it looks as if he was not determined of what company he would be free: and as the eldest son (or daughter, if no son) was provided for by the marriage deeds, so it was not likely that within the first year there would be any younger sons; less likely was it that
[718] within so short a time as the first year, Mr. *Frederick* would have differed with his wife, or have been prejudiced against any infant child. So that if Mr. *Frederick* had died within the year, leaving a will, it had probably been in favour of his wife and child; or if he had died intestate, his personal estate would have fallen to his wife and children by the statute of distribution.

Object. So great a length of time having intervened since the marriage (between forty and fifty years), and it appearing that the court of aldermen did afterwards pay the residue of Mrs. *Frederick*'s portion to Mr. *Frederick*, it may therefore be presumed, that this agreement for Mr. *Frederick*'s taking up his freedom was waived.

Resp. Who could waive it? The wife who was a feme covert all the while could not, and it cannot be supposed that the children without the wife who were under the command of their father, and with whom the agreement was not made, could waive it, nor is it pretended that they have done so; and as to the mayor and aldermen, they themselves neither have nor could waive it, because from the time of making this agreement they were but trustees, and their release would

have been a plain breach of trust, which would not have barred the *cestuy que trust*, nor could it have been available to those who were parties to such breach of trust. And as there could be no waiver, so could there be no laches in the parties now claiming the benefit of this agreement; for as to Mrs. *Frederick* the wife, who was to have her thirds by the custom in case of Mr. *Frederick*'s becoming a freeman, she was all the while under coverture, and the children the greatest part of the time infants.

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No laches to be imputed to a feme covert or infant.

Object. But Mr. *Frederick*'s not being called upon all this time to take up his freedom, has occasioned his dying possessed of a greater personal estate than otherwise he would have done. For if he had been called upon to do it, he would probably have laid out the greatest part of his estate in land, and so have disappointed the custom.

[719]

Resp. The effect of this argument is, that if Mr. *Frederick* had had notice or had thought of this, he would have cheated his wife and children: but not having had notice, nor thinking of it, he has not cheated them. As matters have been managed, a fair experiment has been made, what personal estate, and to what value, Mr. *Frederick* would think fit to die possessed of; what personal estate to invest in land, and likewise what to keep subsisting at his death. It had been a harsh thing (tho' perhaps (*a*) lawful) for Mr. *Frederick* to have invested his personal estate in land, on purpose to avoid his own agreement, and disappoint the custom. All that can be said on this head is, that a man who, as the other side supposes, would not, if he had thought of it, have kept his agreement, has not thought fit to avoid it.

(*a*) Vide ante, 530. Babington v. Greenwood.

If a man covenants, on good consideration, to lay out a sum of money in a purchase of land, to be settled on himself and the heirs of his body by his wife, and he afterwards differs and falls out with his children, and declares that they shall have no benefit of this covenant, and dies before he has laid out the money, yet a court of equity will out of his assets decree this money to be laid out in land, and settled accordingly; nor would it be any excuse to say, that if it had been laid out, it would have been an estate-tail in him, which he afterwards might have barred, though he could not bar the estate-tail till the money was laid out, and the estate settled after the purchase thereof. (*z*)

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(*z*) *Benson* v. *Benson*, ante, 130.

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Object. As to this right of the wife and children to their shares of Mr. *Frederick*'s personal estate, she, or they that would make title thereto, must bring themselves within the custom, and equity is not to enforce or aid the custom, or to intermeddle with the matter.

Resp. Surely, if there be a contract for a valuable consideration, that such a one will take up his freedom, in order to entitle his wife and children to the benefit of the custom, equity will enforce the performance of this as well as of any other contract. It is thus equity every day relieves against fraud in endeavouring to avoid the custom by (*a*) assignments of leases or personal estate, which is all in aid of the custom.

(*a*) Vide 2 Vern. 98. 612.

Object. If there had been a suit against Mr. *Frederick*, to have compelled him to take up his freedom, and a decree for that purpose, and he had stood obstinate, and would not have performed it, this would not have entitled the widow and children to their thirds by the custom; because Mr. *Frederick* was not actually a freeman. Accordingly it has been compared to the case † where tenant in tail made a mortgage and covenanted to levy a fine to the mortgagee, the mortgagee brought a bill against the tenant in tail, to compel him to levy such fine which was decreed; but the tenant in tail, being obstinate, was imprisoned for not performing the decree, and died, there the mortgagee had no benefit of the decree, but lost his money, by the issue in tail's avoiding the mortgage; and if the widow and children would not have been entitled, though there had been a decree in their favour, much less can they be so here, where there is none.

[721]

Resp. 'Tis very true that in case of a decree against tenant in tail to levy a fine, who dies before he has performed the decree, the issue is not bound, because he claims paramount the tenant in tail, and *per formam doni;* but in the principal case Mr. *Frederick* is not by this agreement binding his *issue in tail,* but his *executors;* and surely it will not be said that a man cannot bind his executors. On the contrary, they are bound of course without being named, though the heirs are not.

Vol. II. 197.

Object. By the same reason that Mr. *Frederick* shall in equity be taken for a freeman of *London* by virtue of this agreement, so also shall his children be orphans, and under the guardianship of the court of aldermen, as they would have been, if Mr. *Frederick* had been actually free.

† This was the case of *Weale* v. *Lower*, cited 2 Vern. 306. and Pre. Cha. 279.

Resp. The guardianship of a child is only (*a*) a trust, and no profit, and therefore not within the reason of that part of the custom which entitles the widow and children to their thirds: besides, the guardianship only concerns the court of aldermen, who by their non-claim may have barred themselves of their right, though they could not bar the infants of what belonged to them.

(*a*) See the case of the Duke of Beaufort and Berty, ante, 704.

Object. Mr. *Frederick*'s death alters the case; for he cannot be made a freeman after his death; and so the act of God makes it impossible that this agreement should be specifically performed.

Resp. It is the substance and the chief end of the agreement, that equity will enforce, *viz.* that the widow and children should have their thirds of the personal estate, *which* is not impossible to be performed. This, though Mr. *Frederick* be dead, a court of equity may, and, I think, ought to see executed. Mr. *Frederick*'s unkind usage of his wife and children (it appearing by the proofs that never had a man a more dutiful wife and children, nor ever a wife or children a more unkind husband or father, and not one witness being examined on the other side) plainly entitles them to the compassion of the Court, as does the extreme severity of the will, and the very narrow provision made for them thereby. 'Tis farther observable, that by the articles of separation between Mr. *Frederick* and his wife and children, they were not to come within so many yards of his house, under certain penalties; and therefore cannot be blamed † *for going from the testator in his life-time, and in his old age, without his leave, and against his consent*, when by those articles, they were not to come within so many yards of his house without a forfeiture.

[722]

Upon the whole matter, Mr. *Frederick* having upon good consideration made the agreement to become a freeman of *London* within a year, and having survived that year, he shall in equity be taken for a freeman, and his personal estate distributed accordingly, *viz.* one third to the wife, another third to the children, and the will to operate only on the dead man's third; the wife to have the benefit of her chamber and paraphernalia, but the legacies given by the will to the children to be void, they not being given out of the (*b*) dead man's part, but out of the whole personal estate and so to be void,

(*b*) Quære, et vide ante, Babington v. Greenwood, in the note, 533.

† See Mr. *Frederick*'s will.

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unless the children release their right to the rest of the estate, and abide by the will.

[723] This decree was afterwards affirmed in the House of Lords with 200*l.* costs. (1)

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(1) 4 Bro. P. C. 7. where the case and arguments are reported at length.

1905. 1. Ch. 709.

CASE 208.

CANN *versus* CANN.

LORD CHANCELLOR MACCLESFIELD.

See more relating to this cause, ante, 567.

Where matters have been examined in equity, and determined, the court is cautious of unravelling former decrees, agreements, or releases.

1. Keen. 679.

SIR *Robert Cann* had a wife, and two sons, *William* (afterwards Sir *William*) his eldest son, and *Thomas* (afterwards Sir *Thomas*) *Cann;* Sir *Robert Cann* being seised in fee of divers manors, messuages, and lands, in or near *Bristol* in *Somersetshire,* made his will dated the 19th of *Aug.* 1681, whereby he devised the bulk of his estate to his lady for life, remainder to his younger son *Thomas* in tail, remainder over, and gave only an annuity of 200*l. per ann.* to his eldest son *William,* on condition that he should release his right to every other part of his father's estate; and made his wife executrix. The 10th of *Nov.* 1685 Sir *Robert Cann* died, when his wife entered upon the estate, and proved the will in the spiritual court; and in the same term she and her younger son *Thomas* brought their bill against Sir *William Cann,* (the eldest son and heir) to establish the will.

Hill. term 1685, Sir *William Cann* put in his answer to the bill, insisting that his father the testator had, after the making the will of 1681, *viz.* the summer before he died, made a latter will, and had himself told the defendant of his having done so, calling the former his *mad* will. The same term also Sir *William* brought a cross bill against his mother the lady *Cann,* and his younger brother *Thomas,* for the discovery and setting up of this latter will. To which cross-bill both the defendants answered, and denied any knowledge or belief of any latter will.

[724] *Paschæ* 1686, the lady *Cann* exhibited another bill against Sir *William,* to compel him to make his election, whether he would accept the annuity devised to him, and release his title to the estate, or waive his legacy; to which latter bill Sir *William* answered, again insisting upon the latter will, and that he had seen it; whereupon witnesses were examined on both sides in all these causes, and the 15th of *November* 1687,

the two last causes being heard together, the bill of Sir *William Cann* the heir, as to such part of it as sought to impeach the validity of the will of 1681, or to set up the subsequent will, was dismissed. CANN v. CANN.

April 1688 the lady *Cann* died, having made her will, and *Thomas* her younger son executor thereof, who entered upon the bulk of his father's estate so devised to him.

The 20th of *April* 1689, Sir *William Cann* and his brother *Thomas* came to an agreement for concluding all matters in difference between them, and for establishing peace in the family; and by indenture of that date, reciting the will of 1681, Sir *William Cann*, in consideration that his brother *Thomas* had agreed to convey to him the said Sir *William*, and the heirs of his body, with remainder to the right heirs of Sir *Robert Cann*, the father, the manor of *Breane* in *Somersetshire*, (being part of the estate devised to *Thomas* by the will of 1681) did grant and release to *Thomas* in special tail all the rest of the estate devised *or mentioned to be devised* to the said *Thomas* by the will of 1681. And accordingly *Thomas* conveyed the manor of *Breane* to Sir *William Cann* in special tail, who gave him a general release; whereupon Sir *William* took possession of the manor of *Breane*, and enjoyed it to his death.

Hill. 1694, after all these transactions Sir *William Cann* [725] exhibited a new bill, setting up a latter will, which he insisted the lady *Cann* had burnt, and examined his witnesses *de bene esse*.

Thomas Cann, the second son, pleaded, as to all relief sought by this bill, the several suits and proceedings, decrees, articles, the conveyance of *Breane*, and the release.

The 15th of *November* 1695, it was referred to the master, to see whether the former suits were for the same matter, who upon the 20th of the same month reported them to be for the same matter; but that the plaintiff, Sir *William Cann*, had made farther charges in his bill, calling them *new discoveries*; though they were but new evidences of the pretended latter will.

The 24th of the same *November* the plea was argued before the Lord *Sommers*, who ordered the parties to attend him with the proceeedings in the former cause, and with the bill and plea in this cause, which he would consider of; and the 27th of *July* 1696 the plea being re-argued, the Lord *Sommers* ordered the defendant, *Thomas Cann*, to answer the new matters, but no farther proceedings to be had without leave of the

CANN v. CANN. court. The defendant answered accordingly, but denied every new charge in the bill.

The 17th of *July* 1697, on Sir *William Cann*'s petition for liberty to reply to the answer, and to examine the witnesses in chief, it was ordered, that the defendant by *Bartholomew-tide* should give his answer, whether he would consent to the hearing of the cause, and have an issue directed, whether
[726] Sir *Roberi Cann* did make a will subsequent to that of 1681. But the defendant being advised not to consent to this, the 23d of *October* 1697, upon Sir *William Cann*'s motion it was ordered, that the examiner should attend the *Lord Chancellor* with the depositions, and leave them with his Lordship; and that on consideration thereof the court would give further directions.

The 2d of *July* 1698 Sir *William Cann* died, and in *Trin.* term 1716 the plaintiff, his son and heir, upon coming to age, brought his bill of revivor, and after examining witnesses on both sides, the cause came on to hearing before the Lord *Macclesfield*, who having taken time to consider thereof, now gave judgment and dismissed the bill.

His Lordship said, that this cause was of great consequence to the court, for which reason it ought (tho' on the strongest proof) to be very cautious of giving relief in a case where the matter had been examined and determined; where, after that, there had been a full agreement of the parties to release this suit; and where there was a conveyance of land made by the defendant to the plaintiff's father, accepted by him in satisfaction of all his demands, and the plaintiff himself still in possession of the land thus given in satisfaction; that at the same time there was no charge of any fraud in the defendant, and the plaintiff's whole equity was denied by the answer. That besides this, it was observable, when the plaintiff, at the hearing of the cause, was asked whether he would re-convey this manor of *Breane*, which had been given in satisfaction of the plaintiffs right and demand? he declined rendering it back again.

[727] After publication, and examinations known, this court will not give either side

His Lordship observed the prudent methods of this court were, that after publication is passed, and the purport of the examinations known to the parties, neither side is allowed, though they come recent, to enter into a fresh examination of leave to examine. (*z*)

(*z*) See *Gage* v. *Hunter*, 1 Dick. 49. *Purcell* v. *M'Namara*, 8 Ves. 324. *Whitelocke* v. *Baker*, 13 Ves. 512. *Wood* v. *Hamerton*, 9 Ves. 145. *Butler* v. *Bulkeley*, 2 Swan. 373. *Conethard* v. *Hasted*, 3 Mad. 429.

the matters in question, since otherwise there would be no end of things, and such a proceeding would tend to perjury as well as vexation. But the principal case was much stronger; for here the parties had not only on each side examined witnesses, and those examinations had been published, but the court upon those examinations had made a decree, since which the parties had come to an agreement, and in consequence thereof a conveyance of land had been made by the defendant to the plaintiff's father in satisfaction of his pretended right, and the lands thus conveyed, enjoyed to this time by the plaintiff: that nothing like this had ever been attempted by any person, and if the last bill should prevail, there would be two inconsistent decrees of the same court; one in *favour* of the will of 1681, and another *against* it: that where two parties are contending in this court, and one releases his pretensions to the other, there can be no colour to set this release aside, because the man that made it had a right; for by the same reason there can be no such thing as compromising a suit, nor room for any accommodation; every release supposes the party making it to have a right; but this can be no reason for its being set aside, for then every release might be avoided. Besides, this release is very particular, it being of all lands devised, *or mentioned to be devised.* Indeed, if the party releasing is ignorant of his right, or if his right is concealed (*z*) from him by the person to whom the release is made, these will be good reasons for the setting aside of the release. But no such thing is pretended in this case, and solemn conveyances, releases and agreements made by the parties are not slightly to be blown off and set aside. (1)

No reason to set aside a release, because the party releasing had a right. *Secus*, if ignorant of his right, or if the same was concealed from him.

[728]

Then his Lordship repeated the proofs made in this cause on the part of the plaintiff, which were but dark and doubtful, saying, he did not, on the whole, believe that Sir *Thomas Cann* the testator did actually make a latter will, though there might be some intentions and preparations for that purpose; and it was not clear how the court could have come at it,

(1) So, *Stapilton* v. *Stapilton*, 1 Atk. 10. *Cory* v. *Cory*, 1 Vez. 19. *Pullen* v. *Ready*, 2 Atk. 592. (*y*)

(*z*) See *Broderick* v. *Broderick*, ante, 239. *Osmond* v. *Fitzroy*, post. Vol. III. 129.

(*y*) *Wycherley* v. *Wycherley*, 2 Eden, 175. *Stockley* v. *Stockley*, 1 V. & B. 23. *Roche* v. *Obrien*, 1 Ba. & B. 330. *Leonard* v. *Leonard*, 2 Ba. & B. 171. *Dunnage* v. *White*, 1 Swan. 137. *Gordon* v. *Gordon*, 3 Swan. 400. *Naylor* v. *Winch*, 1 S. & S. 555. *Hotchkis* v. *Dickson*, 2 Bligh, 303. 348.

CANN v. CANN. even if there had been full proof (1) of a latter will. However, there being no such proof, that was not the present question; but here having been a decree, a release and a recompence for such release, there could be no colour for relief.

So the bill of revivor was dismissed with costs.

(1) As to this, vide *Harwood* v. *Goodright*, 2 Bla. Rep. 937. 3 Wils. 497. Cowp. 87. and 7 Bro. P. C. 344.

[729]

DE TERM. S. MICHAELIS, 1721.

1911. 1 Ch. 249.

CASE 209.

TIPPING *versus* TIPPING. (1)

LORD CHANCELLOR MACCLESFIELD.

One dies indebted by covenant more than all his personal assets can pay, and leaving real assets sufficient, the widow shall have her bona paraphernalia, in regard the creditor does not suffer thereby, there being real assets for him.

A. By articles before marriage covenanted for himself and his heirs, with the wife's trustees, to lay out 3,500*l.* in a purchase of land to be settled on the wife for her jointure, remainder to the first, *&c.* sons of that marriage in tail male successively, and died intestate without issue, leaving assets in fee descending to his nephew, who was his heir at law, but the personal estate was not near sufficient for the payment of his debts.

The widow, who was administratrix, brought her bill against the heir, to compel him to make good her jointure, and to have the deficiency of the personal supplied out of the real assets, and having jewels, *&c.* which were her *bona paraphernalia* of the value of 200*l.* and upwards, the question was, whether they in the first place, and in ease of the real assets, should be liable to satisfy this covenant, since *bona paraphernalia* were personal estate, and the rule was said to be, that all the personal ought to be applied in exoneration of the real estate.

[730]

(1) Reg. Lib. B. 1721. fol. 541.

TIPPING *v.* TIPPING.

Lord Chancellor: I take it, that *bona paraphernalia* are (*a*) not devisable by the husband from the wife, any more than heir-looms from the heir, so that the right of the wife to the *bona paraphernalia* is to be preferred to that of a legatee. If the husband by his will gives a lease or a horse, or any specific legacy, and leaves a debt by mortgage or bond in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; but though the creditor may subject this specific legacy to his debt, yet the specific or any other legatee shall in equity stand in the place (1) of the bond-creditor or mortgagee, and take as much out of the real assets, as such creditor by bond or mortgage shall have taken from his specific or other legacy. Wherefore, if a legatee shall have this favour in equity, much more shall the wife be privileged with respect to her *bona paraphernalia*, which are preferred to legacies. Indeed, were the rule of equity otherwise, a specific legatee should compel the application of the *bona paraphernalia* to pay any debt in favour and ease of his specific legacy. Whereas *bona paraphernalia* are liable only (2) to debts, and in favour of creditors, not of an heir; but any creditors by specialty are wholly unconcerned in this question, they being by reason of their bonds, *&c.* in all events secure, which must make it indifferent to them whether they are paid out of the real assets, or out of the *bona paraphernalia;* for still they are sure of being paid; and putting the creditors out of the case, the *bona paraphernalia* shall be retained by the wife.

(*a*) 1 Ro. Abr. 911.

The court divided as to this point.

A specific or other legatee shall stand in the place of a bond or judgment creditor, if these take their satisfaction out of the personal estate.

So the *Lord Chancellor* denied it to be a rule, that in all cases the personal is applicable in ease of the real* estate, for it shall not be so applied, if thereby the payment of any legacy (3) will be prevented, much less where it will deprive the widow of her *bona paraphernalia.* †

The personal estate not to be applied in ease of the real, to the defeating of any legacy.

[*731]

† So decreed by the Lord Chancellor *Macclesfield*, in the case of *Puckering* and *Johnson*, the same term.

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(1) Vide *Clifton* v. *Burt*, ante, 678.

(2) As to the right of the wife to stand in the place of creditors who have been paid by means of her paraphernalia, vide *Tynt* v. *Tynt*, post. Vol. II. 542.

(3) Vide *Oneal* v. *Mead*, ante, 694.

CASE 210. DALSTON *versus* COATSWORTH.

At the Rolls. 2 Eq. Ca. Ab. 287. pl. 3. Where a deed or will is suppressed by the heir, the party claiming under such deed or will decreed to hold and enjoy, and the heir or suppressor of the deed, &c. to convey. (*z*)

THE plaintiff brought a bill for relief against the suppression of a deed, by which the plaintiff's uncle had settled a term in such a manner as that after his and his wife's death (which wife was the defendant) without issue, the same was to come to the plaintiff for the residue of the term.

1. Young 46. 48.

The plaintiff's uncle was dead without issue, and the defendant the wife had burnt the deed.

The defendant by her answer but faintly denied it, (*viz.*) *that she did not remember* she ever burnt or destroyed the said deed.

The witnesses swore the limitations of the settlement to be in trust for the husband for life, remainder to the defendant his wife for life, remainder to the heirs of their bodies [by one witness,] remainder to the issue of their bodies [by another,] and for want of issue by the defendant and her husband, remainder to the plaintiff.

Objected for the defendant, that the limitations of the trust of the term being to the heirs of the bodies of the defendant and her husband, or to the issue of the bodies of the defendant and her husband, remainder over to the plaintiff, such a re-
[732] mainder over of the trust of the term was void in law; and therefore supposing the deed to have been suppressed, yet it could not, were it to be admitted, profit the plaintiff, or make him any title.

But by the *Master of the Rolls*, it is true, where a term is limited to a man and wife for their lives remainder to the heirs of their bodies, and for want of such issue, remainder over, this remainder over being but of a term is void: but on the other side, a term may be limited in the following manner, (*viz.*) to trustees in trust for the husband and wife for their lives, and afterwards for their children, or for their issue; and for want of such children or issue living at the death of the said husband and wife, then to go over to the plaintiff, and

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(*z*) *Bates* v. *Heard*, 1 Dick. 4. *Eyton* v. *Eyton*, 2 Vern. 380. 4 Toml. P. C. 149. *Kenrick* v. *Hudson*, ib. 222. *Cookes* v. *Hellier*, 1 Vez. sen. 234. *Bowles* v. *Stewart*, 1 Sch. & L. 222. 225.

such limitation (1) is good; now, since a term might be limited in such manner, I will intend it to have been so limited in the present case, for every thing shall be presumed *in odium spoliatoris.* (*a*)

(*a*) Vide 1 Vern. 297. 308.

Then *his Honour* considered in what manner the decree should be pronounced, and he cited the case in Hob. 109. (*b*) *The King and Lord Hunsdon* v. *Countess Dowager of Arundel,* where the King and his farmer under him claimed title by the attainder of *Francis Dacres* who was attainted of high treason, and was supposed to be tenant in tail by virtue of a deed not extant, but vehemently suspected to be suppressed and withholden by some under whom the defendants claimed, and therefore it was decreed by the then (*c*) *Lord Chancellor,* with the assistance of the two chief justices (*Coke* and *Hobart*), that the King and his farmer under him should hold the land until the defendants produced the deed, and the court made farther order thereon; *his Honour* said, that Sir *John Trevor* his predecessor had ordered this decree to be searched for, the term being mentioned in the report, but it could not then be found; however, that he himself having since ordered farther search to be made, had found the same, under the name of *Hobart, Attorney General* v. *L——* † so that now any person might have access to the said decree.

(*b*) Moor 832.

(*c*) Lord Nottingham.

[733]

That the next case of this nature was, that of (*d*) *Sanson* v. *Rumsey* town-clerk of *Bristol,* where the defendant *Rumsey* had articled to give a portion to *Sanson* with his daughter, and the defendant had the deed in his custody; the plaintiff suing for the portion, and setting forth the purport of the articles by his bill, the defendant pretended in his answer, that the articles did vary from what the bill set forth, and afterwards burnt the articles; all which being made to appear, he was committed, and continued under confinement till he had admitted the articles to be as the bill had set them forth, which commitment was only by an interlocutory order, and the cause never heard.

(*d*) 2 Vern. 561.

The next was that of *Hampden* v. *Hampden,* heard the 8th of *December* 1708, where the plaintiff claiming as devisee under the defendant's father's will; by proof it appeared that there was such a will, though no exact account was given of

† See also this case particularly stated in the case of *Cowper* v. *Lord Cowper,* Vol. II. 720.

(1) Vide *Stanley* v. *Leigh,* post. Vol. II. 686.

DALSTON v. COATSWORTH.

the contents thereof; but inasmuch as the court was satisfied the defendant had suppressed the will, and for that (though no exact proof was made of the contents) the defendant might clear this by producing the will, therefore it was decreed that the plaintiff the devisee should hold and enjoy until the defendant produced the will and farther order. This cause was first decreed by the late *Master of the Rolls*, then affirmed by the *Lord Chancellor* on appeal, and afterwards by the House of Lords. (1)

[734] The last case was that of *Woodroff* and *Burton, February* 1719, and was thus:

A devisee brought his bill against the heir, and it being made to appear that there was such a will as the plaintiff had suggested, and that the defendant had destroyed it, the Lord Chancellor *Parker* decreed the defendant to convey the premisses to the plaintiff in fee, and to deliver up the possession, which (*his Honour* said) seemed to him to be the most effectual and reasonable decree.

But in the principal case the court said, there could be no decree for the possession, nor any present conveyance to the plaintiff, it being only a remainder of a term after the defendant's death; but let the defendant assign over the term to trustees, in trust for herself for life, and afterwards for the plaintiff; and let her bring the deeds relating to the title into court and pay costs. (2)

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(1) 1 Bro. P. C. 250. (2) Reg. Lib. A. 1722. fol. 232. entered of *Easter* term 1723.

CASE 211.

RICHMOND *et* Ux' *versus* TAYLEUR.

LORD CHANCELLOR MACCLESFIELD.

2 Eq. Ca. Ab. 516. pl. 8. On a bill to set aside a decree against an infant for fraud, if the same be not fraudulent, though in every respect not so equitable, the court will not set it aside.

THE plaintiff brought this bill for the wife's portion: the case was, that upon the marriage of the plaintiff's (Mrs. *Richmond*'s) father *James Tayleur* with *Elizabeth*, the daughter of *Anthony Wallinger*, 1500*l.* was the mother's portion, to which the father added 1000*l.* and by articles, to which the said *Anthony Wallinger* was a party, it was agreed that the wife's 1500*l.* and the husband's 1000*l.* should be laid out in the purchase of land, within a year after the marriage, which should be settled to the use of *James Tayleur* the husband for his life, remainder to *Elizabeth* the wife for her life, remainder

to the first, &c. sons of the marriage successively in tail male, remainder to trustees for 1000 years, to raise portions for the daughters of the marriage, if no son, (*viz.*) if but one daughter, 1000*l.* if two 1500*l.* betwixt them, if more, 500*l.* a-piece. Proviso, that if before the money laid out in the purchase, the plaintiff's father and mother, (*viz.*) *Tayleur* and his wife, or ether of them should die, leaving issue only one daughter, then that daughter should have the whole 2500*l.* Also the husband *Tayleur* covenanted, that if his intended wife should die before him, he would leave, after his death, to the issue of the marriage 500*l.* beyond what was before settled.

In 1689 the marriage betwixt the plaintiff's father and mother was solemnized, and in 1695 the plaintiff's mother (Mrs. *Tayleur*) died, leaving issue only the plaintiff, now married to the other plaintiff *Richmond*, which marriage he gained † by corrupting the servant, and without the father's consent, having himself no estate, and becoming a bankrupt within a year after the marriage.

The plaintiff's father (*James Tayleur*) after the death of his wife, brought a bill against his daughter the now plaintiff, and her grandfather *Anthony Wallinger*, (who was a trustee in the articles) praying that he might be relieved against the lapse of time, for that the purchase with the 2500*l.* was not made within a year, and that his daughter might not claim the whole after his death; that he was willing to lay out the 2500*l.* in a purchase, but insisted that his daughter ought not to have more than she would have had, if the purchase had been made in the mother's life-time.

Anthony Wallinger the father of *Tayleur*'s late wife, and grandfather of the now plaintiff the infant, by his answer, [736] allowed it to be hard that *Tayleur* should be obliged to leave the whole 2500*l* to his daughter after his death, that *Tayleur* had been from time to time inquiring after a purchase, and that it was not through his neglect a purchase had not been made. After which the cause was heard by consent, and an absolute decree made (without giving the infant a day to shew cause to the contrary) whereby it was directed that the 2500*l.* should be laid out in a purchase of land to be settled in the same manner as if the purchase had been made in the mother's life-time, by which the daughter would have been entitled to the 1000*l.* and the 500*l.* only, and it was referred to the master to see the purchase and settlement made; accordingly

† See this stated in the case of *Jacobson* v. *Williams*, ante, 382.

RICHMOND v. TAYLEUR.

the master did approve of a purchase, and of the settlement thereof, whereby 1000*l.* and 500*l.* was secured to the now plaintiff the daughter, on the father's death. Afterwards *Tayleur* the father married again, and left several sons.

And now the plaintiffs, *Richmond* the husband and his wife, brought their bill, suggesting that this decree was gained by fraud and collusion, and ought to be set aside, and the whole 2500*l.* paid to him.

The defendants at first pleaded the decree and report; but the plea being over-ruled, they insisted upon them by their answer.

Lord Chancellor: The articles are blindly penned; however, the plaintiff's bill is grounded upon the fraud and collusion made use of in obtaining the former decree against his wife, then a tender infant; and if any fraud or surprise upon the court had been proved, I would have set aside the decree; but on the contrary, it appears that the court was fairly and fully

[737] apprised of the case, of the articles, and of the point in question, *viz.* the lapse of time, and hath thought fit to make a decree, which, as it may be a just one, therefore I will not set it aside. And the plaintiff having been a bankrupt, obtained his wife in manner as above, and not being able to maintain her, let the 1500*l.* and interest since the father *Tayleur*'s death be brought before the master, the interest thereof to be applied for the maintenance of the wife (*z*) and child, with liberty to the wife or child to apply, if the husband dies. (1)

An infant aggrieved by a decree not bound to stay till he is of age, but may apply as soon as he thinks fit to reverse it, and may do this either by bill of review, rehearing, or by original bill, alledging specially the errors in the former decree.

Note; In this case it was held, that where an infant conceives himself aggrieved by a decree, he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit (*y*); neither is he bound to proceed by way of rehearing or bill of review, but may impeach the former decree by an (2) original

(1) Reg. Lib. B. 1721. fol. 462.

(2) Vide *Lloyd* v. *Mansell*, post. Vol. II. 73. *Galley* v. *Baker*, Ca. temp. Talb. 201. *Barnsley* v. *Powell*, 1 Vez. 120. *Wortley* v. *Birkhead*, 3 Atk. 811. (*x*)

(*z*) See *Oxenden* v. *Oxenden*, 2 Vern. 493. *Nicholls* v. *Danvers*, ib. 671. *Williams* v. *Callow*, ib. 752. *Ball* v. *Montgomery*, 2 Ves. jun. 191. *Bullock* v. *Menzies*, 4 Ves. 798. *Wright* v. *Morley*, 11 Ves. 12. *Duncan* v. *Duncan*, 19 Ves. 394. Coop. 254.

(*y*) But see *Bennet* v. *Lee*, 2 Atk. 487.

(*x*) *Carew* v. *Johnston*, 2 Sch. & L. 292. and see *Savage* v. *Carroll*, 1 Ba. & B. 548.

bill, in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause against it; and Mr *Cottingham* (his lordship's secretary) acquainted the court that Mr. *Vernon*, in case of an erroneous decree against an infant, used always to advise the bringing of an original bill to set it aside, but in such bill to alledge specially the errors in the former decree.

ORLEBAR *versus* FLETCHER AND THE DUKE OF KENT.

CASE 212.

[*738]

At the Rolls.

2 Eq. Ca. Ab. 108. pl. 2. A trader seised of land in fee, gives judgment to B. and then sells the land to C. and afterwards becomes a bankrupt; though the judgment creditor cannot come in for more than his proportion with the bankrupt's creditors, whether he may not extend the lands in C. the purchaser's hands, C. having purchased before the bankruptcy, and this not prejudicing the creditors. So if A. the trader gives judgment to B. and articles for a valuable consideration to sell to C. and then becomes a bankrupt, it seems the judgment shall bind the lands in the hands of C. who articled to buy them; but whatever money the purchaser was to pay the bankrupt, the same shall be liable to the bankruptcy. (*z*)

IN *February* 1716, the defendant *Fletcher* being seised in fee of some lands in *Bedfordshire*, borrowed * 1500*l.* of the plaintiff *Orlebar* (one of the masters in Chancery) on a judgment. Afterwards, (*viz.*) *August* 20, 1717, the defendant *Fletcher* articled with the other defendant the *Duke of Kent*, to sell the premisses to the *Duke*, in consideration of 5000*l.* to be paid down, and 650*l.* to be paid at *Christmas* then next, the Duke to be let into possession at *Michaelmas*; subsequent to which transactions, the defendant *Fletcher* becoming a bankrupt, the plaintiff Mr. *Orlebar* brought his bill against the *Duke of Kent*, *Fletcher* the bankrupt and the assignees under the commission, praying that the 650*l.* remaining in the *Duke of Kent*'s hands, might be paid to the plaintiff, towards satisfaction of his judgment.

Upon the opening of the cause the *Master of the Rolls* observed, that by the statute of 21 Jac. 1. cap. 19. sect. 9. it is provided "that creditors by judgment, statute or recogni-"zance, whereof no extent is served or executed on a bank-"rupt before his bankruptcy, shall not be relieved for more "than a rateable part of their just debt."

To which I replied, that the words [shall not be relieved for more, *&c.*] imported only, *that they should not have relief*

(*z*) *Sloper* v. *Fish*, 2 V. & B. 145.

ORLEBAR v. FLETCHER.

upon the commission; † but if they could extend the defendant's land, they were to be left at liberty; that the statute only restrained the judgment creditor from proceeding against the personal estate of the bankrupt; but as to the real estate upon which the judgment was an actual and vested lien, it could never have been the intention of the parliament, to divest a creditor of this right; besides, the other words of the statute [without regard had to the penalty] might intend this clause to be satisfied by relieving against the penalty.

[739] However, the court interrupted me while I was speaking to this point, and said this was attempting to disturb what was already settled; that it had been determined at law, that where a judgment was not served or executed, the cognizee thereof should only come in *pro rata* with the other creditors of the bankrupt.

Then I urged that these articles by *Fletcher* before his bankruptcy, to sell the land to the *Duke of Kent*, especially when the *Duke* had paid the greatest part of the purchase money and was in possession, were as a sale in equity: that if a trader seised of land in fee, should confess a judgment to *A.* and then sell the land to *B.* and afterwards become a bankrupt, though *A.* the judgment creditor could not come in upon the bankrupt's estate for any more than his proportion with the other creditors, yet he would be at liberty to extend his judgment against the purchaser, who bought the land prior to the bankruptcy; which seemed to be admitted.

But in the principal case the court said, that the *Duke of Kent* could not be deemed a purchaser, until he had paid the 650*l.* which, remaining in the *Duke*'s hands, was part of the personal estate of the bankrupt, and must be liable to his creditors: that the *Duke* was not to be compelled to pay it unless upon his having a good title, which was to be made him by the assignees of the commission of bankruptcy, who had the legal estate of the premisses assigned to them by the commissioners.

Wherefore *per* (1) *Cur':* let the assignees convey the premisses in fee to the *Duke of Kent,* in the same manner as the

† See the case of Sir *George Newland* and *Beckley* v. ——, ante, 92.

(1) Reg. Lib. B. 1721. fol. 10. A bare order of dismissal upon hearing the pleadings opened and the stat. of 21 Jac. 1. read.

bankrupt had articled to do, they standing in his place, and in consideration of this, let his Grace pay the 650*l.* the remainder of his purchase money to the assignees for the benefit of the creditors; and as to the plaintiff Mr. *Orlebar*, the judgment creditor, he must come in for a proportion only with the rest of them.

ORLEBAR *v.* FLETCHER.

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LONGFORD *versus* EYRE.

CASE 213.

LORD CHANCELLOR MACCLESFIELD.

2 Eq. Ca. Ab. 660. pl. 6. 762. pl. 9.

A witness proving a will of land, swears that he subscribed it in the same room, and at the testator's request; held good, tho' not said in the testator's presence.

THE Lady *Clutterbuck*, before her marriage with Mr. *Rumsey* of *Bristol*, did, with his consent, convey her estate to trustees to such uses and for such estates as she should by deed or will, or by any writing in the nature of a will, appoint. Having afterwards married Mr. *Rumsey*, she made her will, and thereby devised these lands: there were four witnesses to the will, one of whom was gone beyond sea, two swore that they saw the will executed by the testatrix, and that they subscribed the same in the presence of the testatrix; the third swore that he subscribed the will as a witness in the same room, and at the request of the testatrix.

The Lord *Cowper* (before whom the cause was first heard) doubted as to the proof of the execution of this will, but would declare no opinion on the point until farther application, saying, that the heir at law, who was then an infant, might by that time come of age. And now this matter coming on again before the Lord *Macclesfield*, it was urged, 1*st*, that the witness subscribing this will in the same room with the testatrix, was the same as in her presence; nay, it had been resolved in Sir *George Shiers*'s case (*a*) that though the witnesses subscribed their names to the will in another room, yet there happening to be a window in that room, through which the testator might see them, it was well enough. 2*dly*, It was insisted, that if the will was not good as such, yet this was a writing in nature of a will: and forasmuch as the appointee in this case was not in by the will or writing of appointment, but by the original conveyance, the writing in question would be a good appointment, though not a good will.

(*a*) Salk. 688.

[741]

A witness to prove a will of land, ought to prove that the will was executed in his presence, and also in the presence of the two other witnesses, and that they subscribed in the presence of the testator.

Lord Chancellor: The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator, and his own sub-

LONGFORD v. EYRE.

scribing it in the presence of the testator, but likewise the rest of the witnesses subscribing their names in the presence of the testator; and then one (*z*) witness proves the full execution of a will, since he proves that the testator executed it; and likewise that the three witnesses subscribed it in his presence.

But this is not done in the principal case.

2*dly*, He held that the bare subscribing the will by the witnesses in the same room did not necessarily imply it to be in the testator's presence: for it might be in a corner of the room, in a clandestine, fraudulent way; and then it would not be a subscribing by the witness in the testator's *presence*, merely because in the same room; but that here it being sworn by the witness, that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and was therefore well enough. (1)

[*742]

Power to appoint an use of land by deed or will. A will attested by two witnesses not a good appointment; because in such case "by a will" must be intended such a will as is proper to dispose of land. So though the words are, "or other writing in nature of a will."

3*dly*, *His Lordship* much doubted, whether this will would have been a good appointment, had it not been executed pursuant to the statute of frauds; because when a power is given to appoint the uses of land by * deed or will, the will must be intended (2) such a one as is proper for the disposition of land;

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(1) Vide *Dormer* v. *Thurland*, post. Vol. II. 509. *Stonehouse* v. *Evelyn*, post. Vol. III. 254. *Gryle* v. *Gryle*, 2 Atk. 176. *Grayson* v. *Atkinson*, 2 Vez. 454. *Carleton* v. *Griffin*, 1 Burr. 549. *Right* v *Price*, Doug. 229. *Casson* v. *Dade*, 1 Bro C. C. 99. as to the several requisites of the statute of frauds with respect to devises. (*y*)

(2) Vide *Wagstaff* v. *Wagstaff*, post. Vol. II. 258.

(*z*) See *Bootle* v. *Blundell*, 19 Ves. 494. Coop. 136.

(*y*) The following are some of the decisions on the 5th section of the statute of frauds: Sealing is not a signing, *Ellis* v. *Smith*, 1 Ves. jun. 11. *Smith* v. *Evans*, 1 Wils. 313. The will need not be *subscribed* by the testator, provided he writes his name in any part of it, so as to authenticate it, *Lemayne* v. *Stanley*, 3 Lev. 1. *Cook* v. *Parsons*, Pre. Cha. 184. The signature need not be affixed in the presence of the witnesses, an acknowledgment of it to them by the testator being enough, *Dormer* v. *Thurland*, *Stonehouse* v. *Evelyn*, *Grayson* v. *Atkinson*, ub. sup. *Westbeach* v. *Kennedy*, 1 V. & B. 362. The acknowledgment need not be made to, nor the will attested by, the different witnesses at the same time, *Cook* v. *Parsons*, ub. sup. *Jones* v. *Lake*, 2 Atk. 176.n. The testator need not actually see the witnesses subscribe the attestation, *Shires* v. *Glascock*, 2 Salk. 688. *Longford* v. *Eyre*, sup. *Casson* v. *Dade*, ub. sup. but he must be in such a situation that he may see them, *Broderick* v. *Broderick*, ante, 239. *Doe* v. *Manifold*, 1 M. & S. 294. He must be sensible of what is passing, *Right* v. *Price*, ub. sup. The will of a blind

consequently subscribed by three witnesses in the presence of the testator; for this is within all the inconveniencies that the statute of frauds intended to prevent, and the other words *in the nature of a will* mean the same as a will, which must therefore be subscribed by witnesses in the presence of the testator. But for the reasons aforesaid it was declared this was a good will both as to the real and personal estate.

HOLLINGSHEAD'S CASE.

LORD CHANCELLOR MACCLESFIELD.

A. Is partner with *B.* in the trade of a mercer. *A.* dies intestate, and *C.* his administrator brings a bill in equity against *B.* for an account of the partnership effects. Whereupon the cause is heard, and an account being decreed, the master makes a report, by which it appears, that there is nothing due from the defendant to the plaintiff. *C.* takes exceptions to the master's report, and then dies, and the now plaintiff having taken out administration *de bonis non* of *A.* brought his bill of revivor to revive these proceedings.

2 Eq. Ca. Ab. 2. note to pl. 3. 579. pl. 7. On a bill in equity being abated by death, the executor or administrator barred by statute of limitation, if they do not revive within six years; but not after a decree to account. (*z*)

The defendant pleads the statute of limitations, and that above six years had passed after the death of the first administrator and the plaintiff's taking out letters of administration, before the filing of the bill of revivor.

For the plaintiff it was argued, 1*st*, That the statute of limitations was an improper plea in this case; that praying to revive was praying to stand in the place of the first plaintiff, which the plaintiff when he had revived would do, and consequently would not be barred by the statute of limitations, since it was not pretended but that the first suit was brought in time. 2*dly*, That a decree of the court of Chancery was in nature of a judgment; and it could not be thought a judgment was within the statute of limitations; for even a specialty

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man need not be read over to him in the presence of the witnesses, *Longchamp* v. *Fish*, 2 N. R. 415. Attestation by a marksman is good, *Harrison* v. *Harrison*, 8 Ves. 185.

(*z*) See *Smith* v. *Clay*, Amb. 645. *Hercy* v. *Dinwoody*, 2 Ves. jun. 87. 4 Bro. C. C. 257. *Pearson* v. *Belchier*, 4 Ves. 627. *Hovenden* v. *Annesley*, 2 Sch. & L. 630. *Egremont* v. *Hamilton*, 1 Ba. & B. 516.

HOLLINGS-HEAD'S CASE.

was not; and a decree, though only to account, was still a decree. 3*dly*, That there was no reason this case should be taken as within the statute of limitations, because the defendant, in the case of an account (where each side are actors) if he thought fit, might revive, and so the delay of the plaintiff is not to be objected by the defendant in whose power it was to have prevented any ill consequence therefrom.

Attorney General Raymond *contra:* It is true, when the plaintiff has revived, he stands in the place of the plaintiff in the original bill; but this plea is pleaded in bar of reviving, and until then the plaintiff does not stand in his place; and we may well object, that by the statute of limitations he ought to have come sooner; to which the court seemed to incline. As to the second objection, he observed, that this decree being only to account, was but interlocutory, and it did not appear by such decree that one farthing was due from the defendant to the plaintiff; so that it established no debt, nor was it evidence of the plaintiff's having any just cause of suit. With regard to the third objection, he admitted either side might revive in this case; but it would be hard to put the defendant to revive a chargeable suit against himself, when he might be satisfied in his conscience that nothing was really due, and here was room for the court to intend so in this case, when the master, after examining into the matter, had reported nothing due; and though by exceptions being put in to the report, such report was suspended, yet the plaintiff should not have slept six years after the administration taken out.

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Lord Chancellor; The statute of limitations speaks nothing of bills in equity, yet these are construed to be within it. The case of not reviving a decree which is only to account, is within all the mischief designed to be prevented, *viz.* to sue a man after his vouchers may have been lost, or his witnesses dead. For if the party may delay six years before he revives his bill, he may by the same reason forbear twenty-six, thirty-six or forty-six years. There can be no doubt but that if this were only a bill and answer, and the suit abated, the executor must bring his bill of revivor within six years, else the suit would be barred. Now the reason holds still as strongly in case of a decree to account, which is in nature of a judgment *quod computet;* where, if the plaintiff had died, his executor or administrator could not formerly carry it on, as now by the late statute (*a*) he may; and though it may seem a material objection, that when there is a decree to account, the defendant as well as plaintiff may revive; it would however be very hard

(*a*) 8 & 9 W. 3. c. 11.

for equity to force a man to revive a suit against himself at the same time that he swears that he owes nothing. HOLLINGSHEAD'S CASE.

Therefore let the plaintiff amend his bill, and the defendant his answer, to bring the matter more fully before the court.

After which the defendant died, and one *Beecher* administering to him, the plaintiff brought another bill of revivor; whereupon the defendant *Beecher* pleaded the statute of limitations, and coming to be argued before Lord Chancellor *King* in Mic. 1727, his Lordship disallowed the plea, saying that a bill of revivor after a decree to account, was in nature of a *sci. fa.* and not within or barrable by the statute of limitations; though the demand seemed to be a very stale one, and not to be countenanced. [745]

SAVILE *versus* SAVILE.

CASE 215.

IN this cause there was a decree (*inter al.*) for the sale of *Halifax-house* in St. *James's Square*, to the best purchaser before the Master, and *Thomas Frederick* esq. was reported the best bidder at 10,500*l*, having made 1000*l*. deposit.

LORD CHANCELLOR MACCLESFIELD.

2 Eq. Ca. Ab. 679. pl. 4. Purchaser before a Master submitting to forfeit his deposit, not bound to proceed in the purchase.

On the days of petitions after *Hilary* term it was prayed, that Mr. *Frederick* might compleat his purchase, and pay the remainder of the purchase-money; upon which Mr. *Frederick* by his counsel declared that he elected to lose his deposit.

But the Lord *Nottingham* grandfather and guardian to the young ladies the plaintiffs (who were the daughters and coheirs of *William* late Lord Marquis of *Halifax* by Lady *Mary Finch*) insisted, that Mr. *Frederick* being the best bidder ought to pay the residue of the purchase-money, and being present himself, urged, that this contract, since it was made with the court in trust for the plaintiffs, could not, (as he thought) be discharged upon any other terms, than payment of the residue of the purchase money: that had it been the case of a private contract between party and party, and so much money paid as earnest, there could be no reason to imagine, that because the intended purchaser paid so much by way of earnest, therefore he should be at liberty to get off from the bargain by losing his earnest; and surely the contract made with the

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court was at least as strong as if made with the *party*: that if there had been no deposit, it would hardly have been a question but that the party should have been compelled to pay the whole purchase-money, and could it be imagined that the contract was the weaker because there was a deposit? This would be inverting the very sense and meaning of the parties, and to construe that a deposit should weaken instead of strengthening the contract: that forfeiting the deposit was surely the most unequal way that could be: for it made no alteration, whatever the deposit was, whether greater or smaller; and therefore in the case of *Morrett* v. *Bennett* †, where the deposit was ten thousand pounds, the whole deposit was forfeited, and if in that case it had been but *one* thousand pounds, yet only so much as had been deposited could be forfeited; from whence it seemed, that as the deposit might bear a very great disproportion to the value of the estate, it could consequently be no proper measure of satisfaction to the seller, for the buyer's receding from his contract; that as the seller was bound to sell, so ought the tie to be mutual upon the buyer also.

Lord Chancellor took notice that more had been urged by the Lord *Nottingham* than he had ever heard on this subject, but that he had taken good advice and well considered before he made the like order in the other cases: that according to his apprehension, a court of equity ought to take notice under what a general delusion the nation was at the time when this contract was made by Mr. *Frederick*, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on
[747] estates: that as upon a contract betwixt party and party, the contractor would not be decreed to pay an unreasonable (*z*) price for an estate, so neither ought the court to be partial to itself, and do more upon a contract made with itself, or carry that farther, than it would a contract betwixt party and party. On the other hand the court might be said to have rather a greater power over a contract made with *itself* than with any *other*.

That the deposit was supposed to be a proper pledge for se-

† Determined in this court some little time before; as was also the case of Dr. *Tennison* v. Lord *Bulkley*; in both which cases the best bidders upon losing their deposits were discharged of their contracts.

(*z*) *Day* v. *Newman*, 2 Cox, 77.

curing the seller in case the intended purchaser should afterwards go off; and had it not been sufficient, the other side might have moved to have such deposit increased; but being thought a sufficient pledge, it was punishment enough if the party that made it was to lose it, and satisfaction enough to the seller, if he was to have the benefit of keeping the deposit: that in this case the deposit was near a tithe of the purchase-money; so that if the seller could get as much within 1000*l.* of any other purchaser, he would be no loser; and if he could not get so much within 1000*l.* then it would appear to be dear sold; and consequently a bargain not fit to be executed by this court: that the court had made several orders in cases of this nature, attended with stronger circumstances; as where the estates were greatly incumbered, and the creditors would lose their debts if the bargains did not proceed; but an hardship ought not to be decreed against one, in order to prevent its falling upon another: and if those orders should be discharged, whereby others got off from contracts by losing their deposits, it would make great confusion; and their money must be brought again into court. The best way certainly was, for the court to be uniform in its resolutions.

Wherefore it was ordered that Mr. *Frederick* should lose his deposit of 1000*l.* and be discharged of his contract. (1) [748]

(1) But this is not the general law of the Court; and the decision was probably founded on the general delusion of the times, as taken notice of by Lord *Macclesfield.* (*z*)

(*z*) *Crutchley* v. *Jerningham*, 2 Mer. 506. So where a bond is given for performance of a contract, the obligor cannot vacate his contract on payment of the penalty of his bond, *Prebble* v. *Boghurst*, 1 Swan. 318.

CASE 216.

LORD CHANCELLOR MACCLESFIELD.

PLEYDELL, WIDOW AND EXECUTRIX OF JOHN PLEYDELL, } Plaintiff;

RANDOLPH PLEYDELL AND CHAMPNEYS PLEYDELL, } Defendants.

2 Eq. Ca. Ab. 347. pl. 12. Devise of 400*l.* to *A.* and if *A.* die without issue, then to *B.*; this is good, and must be intended if *A.* die without issue living at his death. (1)

THE plaintiff's bill (*inter al'.*) was to have the direction of the court touching two several sums of 400*l.* and 400*l.* devised by the will of *John Pleydell* her late husband.

9. Jur. 8.
2. Myl. & Kee. 446
2. Keen. 6 8.

The case was thus: *John Pleydell* having no issue by the plaintiff *Elizabeth* his wife, had two brothers, the defendants *Randolph* and *Champneys Pleydell*, and by will dated *May* 1719 gave all his money and securities for money to the defendants his said brothers in trust to pay 200*l.* to his wife absolutely, and to pay the interest of all the rest of his money to his wife for her life. After her death he gave the interest of 400*l.* part of the residue, to his brother *Randolph Pleydell* for his life, then to his first son, payable to him until he should attain his age of 21; at which time he was to be paid the principal sum of 400*l.* But if such eldest son should die before his age of 21, then the testator devised the interest of the said 400*l.* to the second son of the said *Randolph Pleydell* until his age of 21, and then to pay him the principal sum of 400*l.* and in case of his death before 21, to the third, fourth, *&c.* sons of the said *Randolph Pleydell* in like manner.

[749] He also gave the interest of another sum of 400*l.* to his said other brother the defendant *Champneys Pleydell* for his life; and after his death the interest to go to the first son of this *Champneys* until his age of 21, when the principal sum was to be paid him: but if it should happen that his first son should die before his age of 21, then the interest to be paid to the second son of *Champneys* until his age of 21, at which time the principal sum of 400*l.* was to be paid to such second son; but if he should die before 21, to the third son. After which came a clause, "that if either of the said testator's brothers "(the defendants *Randolph* or *Champneys Pleydell*) should "die without issue, in such case his share was to go to the

(1) Vide *Nicholls* v. *Hooper*, ante, 198. (*y*)

(*y*) And note to *Atkinson* v. *Hutchinson*, post. Vol. III. 262.

"testator's right heirs." And the testator made his wife executrix and residuary legatee.

The cause was heard before the *Master of the Rolls*, who decreed, that as to the said two sums of 400*l.* and 400*l.* if the defendants *Randolph* and *Champneys Pleydell* should die without issue *living at their death*, then the share of him or them so dying should belong to the right heir of the testator *John Pleydell*, and not to the plaintiff *Elizabeth* the executrix; but if it should happen that the defendants *Randolph* and *Champneys Pleydell* should die, leaving issue, which issue should also die before the age of 21, in such case these shares should sink into the *residuum* of the testator's personal estate.

From this decree the plaintiff appealed to the *Lord Chancellor*, insisting that if either of the defendants *Randolph* or *Champneys Pleydell* should die without issue, his 400*l.* should go to the plaintiff the executrix and residuary legatee, and not to the heir of the testator *John Pleydell*; for that the limitation of this 400*l.* to the right heir of the testator after a death without issue, was too remote a possibility in case of a limitation of money, for which I cited 2 Vent. 349. *Broadhurst* and *Richardson*, and *Love* and *Windham*'s case, Sid. 450. as also several others in (*a*) *Pollexfen*'s Reports.

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(*a*) Vide from fol. 21. to fol. 44.

Lord Chancellor: There is a great difference between a limitation of a trust of a term for years in such a manner as that all power of alienation may be thereby restrained, and consequently a perpetuity introduced, and a limitation of a trust of a sum of money, which may be subject to more remote contingencies; for in the latter case I should think a bond to pay a sum of money upon the death of *A. B.* without issue of his body would be good (*b*) and for the same reason the trust of money limited upon such contingency would be allowed also. However the proviso in the present case must be taken and understood of a death without issue then living, which is the common meaning of this expression. And though in case of a devise of land to a man, and if he die without issue, then to *J. S.* this would give an estate-tail, *viz.* to the issue of the devisee, and so successively to the latest posterity, yet such construction is contrary to the natural import of the expression, and made purely to comply with the intention of the testator, which seems to be that the land devised should go to the issue and their issue to all generations. But notwithstanding this, it would be very strange to put a forced construction upon words contrary and repugnant to their usual

(*b*) Vide the case of Pinbury and Elkin, ante, 566.

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import, and only to defeat the design of the testator, by frustrating that estate which he intended to give.

(c) Vid. 1 Vern. 35. Danvers v. Earl of Clarendon.

But whether this remainder shall go to him that *is* (c) *now* right heir of the testator, or to such as *shall be so* at the time when either of the defendants *Randolph* and *Champneys Pleydell* shall die without issue then living, let the consideration thereof be respited till that contingency happens, when it will be proper to make such heir a party to this bill. (1)

(1) Reg. Lib. B. 1721. But in *Shepherd* v. *Lessingham*, 29 *Oct.* 1751, (now reported in Amb. 122.) Lord *Hardwicke* observed, that in *Pleydell* v. *Pleydell*, the former limitations being to sons, the dying without "issue" must mean "such issue;" *i. e.* "sons:" and that case, therefore, did not turn on any general doctrine, that the construction of "dying without issue" was different in limitations of personal estate and of real, as stated by *P. Williams*.

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CASE 217.

POLLEN *versus* SIR JOHN HUBAND *et al'*.

LORD MACCLESFIELD. Equity will assist a compo sition of a debt, if obtained without fraud, and upon a fair representation. (2)

THE plaintiff was executor and devisee in the will of the late Sir *John Huband*, and received the personal, together with the rents and profits of the real estate; but in a suit in equity touching the said will, being decreed to be but a trustee, he was ordered to account with the defendant for what he had received of the trust estate, and upon the account was reported indebted 4000*l.* to the defendant; afterwards on an appeal to the Lords this decree was affirmed. Whereupon *Pollen* standing out all process of contempt, fled beyond sea, and while he was abroad, an accommodation was set on foot, by which it was agreed that *Pollen* should pay a small sum to the defendant Sir *John Huband*, who thereupon was to release and indemnify him from the creditors of the late Sir *John Huband*.

After this, *Pollen* being threatened with suits by some of the creditors brought his bill for a specific performance of the agreement, and that the defendant should, pursuant thereto, indemnify him against the creditors of the late Sir *John Huband*.

Objected, That there was not sufficient reason in this case to extend the aid of a court of equity in favour of *Pollen*, who had acted an ill part throughout. 1*st*, In setting up a title in

(2) Vide *Cann* v. *Cann*, ante, 727.

his own right, when he was but a trustee. 2*dly*, In turning his back upon justice and flying beyond sea. 3*dly*, In putting the defendants to streights and difficulties, by detaining their just debts from them, and then taking advantage of those difficulties in making them comply and take small sums in satisfaction of much greater; for all which reasons it was said to be very proper to leave the plaintiff to make the most at law of his composition, but not to give him the least aid in equity.

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Lord Chancellor: It must be admitted to have been in the power of Sir *John Huband* to make a composition of this demand, and to release (if he had so pleased) the whole debt. It was very lawful either for the plaintiff to ask a composition or for the defendant Sir *John Huband* to grant it. Wherefore all that equity ought to guard against is only, that no fraud be used in obtaining the release or composition; but this case is stronger, as it was the defendant Sir *John Huband* who first proposed and desired the plaintiff to come into the composition; on the other hand *Rawlins* the agent of *Pollen* put every thing in a true light, and the defendant *Huband* declared he did not desire to drive the plaintiff from his family and country. Besides, *Pollen* having got out of the reach of justice, it might be for the benefit of the defendant to accept of this, though a small composition. So that there being a fair representation on the plaintiff's side, and a just compliance by the defendant, and in a great measure executed by the plaintiff, let the defendant Sir *John Huband* execute his part of the agreement and indemnify the plaintiff against the debts of Sir *John Huband* the testator.

HUMPHREYS *versus* INGLEDON.

CASE 216.

ONE brings a bill as executor for the recovery of some of the testators assets, wherein it does not appear that he has any ways proved the will; the defendant demurs, in regard the plaintiff has not shewn by his bill, that he has in any court proved his testator's will.

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Executor cannot bring a bill without shewing thereby that he has proved the will in the spiritual court; if he does, this is good cause of demurrer. But it is enough to alledge he has duly proved the will, without saying in what court. See case 220.

Lord Chancellor: The plaintiff is very stiff, after having been told of this slip by the demurrer, not to amend his bill,

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and if he does not prove the will before he is allowed to proceed here, probably he never will; now as the Courts at law never take notice of a (*a*) will, so as to allow the executor to sue upon it for any personal estate, until he has first proved it in the spiritual court, so it is very reasonable to observe the same rule in equity; indeed in every other respect, saving only as to the liberty of suing, the executor is compleatly so, before probate; for instance, he may assign or (*b*) release, but ought not to be allowed to sue.

(*a*) Vide Comber's case, post. 767.

(*b*) Co. Litt. 292. b.

The court asked Mr. *Goldsborough* the register how the course was as to this point? who answered, that the plaintiff ought to alledge by the bill that he had † duly proved the will; but though he did not mention in what court, it would be enough; whereupon the demurrer was allowed.

† The Lord Keeper *North*, when he first came into this court, was of opinion, that a plaintiff administrator ought to shew by his bill where he had taken out administration, to the intent the defendant might be informed in what court to look for it, which might be void if taken out under a wrong jurisdiction; yet of late the general allegation of having duly taken out administration has been held good, especially where (as on demurrer) the cause is not then to be determined, but the plaintiff must shew his letters of administration at the hearing. So said and determined by the Lord *King* in the case of *Stone* v. *Baker*, the 13th of *December* 1732.

Quære, Whether there is any difference, as to this point, between an administration and an executorship?

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CASE 219. ATTORNEY GENERAL, AT THE RELATION OF FOLKES AND BATTELY, Appellants;

3. Myl. & Cr. 141.

SUTTON AND PAYMAN, Respondents.

In Domo Procerum. (1)

2 Eq. Ca. Ab. 314. pl. 22. Fort. Rep. 66. One seised of some lands in fee, and being cestuy que trust of other lands, devises them to *A.* for life, remainder to his first and second son in tail male (going no farther), and after *A.*'s death, without issue male, then to a charity. *A.* is tenant in tail until issue born, saving as to the trust estate. (*a*) Feb. 10. 7 Geo.

THIS was an appeal to the House of Lords from an order (*a*) made by the Barons of the *Exchequer*, by which they allowed the respondent's plea to an information brought for establishing several charities given by the will of *John Sut-*

(1) 2 Bro. P. C. 282.

ton out of some lands in *Suffolk*, wherein the testator had only the trust or equitable interest, and out of the *Chequer-Inn* in *Holborn*, wherein he had the legal estate: all which charities were to take effect upon the death of the testator's nephew *Thomas Sutton* without issue male of his body.

The plea to this information was, "that *Thomas Sutton* "the testator's nephew being tenant in tail by the will, had "suffered a common recovery, and thereby barred the chari-"ties."

The respondents claimed under the recovery; the appellants under the charities. And the question was, whether this will gave an estate-tail in the premisses to *Thomas Sutton* the testator's nephew?

This case was argued at the Lords' bar, on *Wednesday* the 20th of *December* 1721, and on the will was thus:

John Sutton the testator, seised in fee of the legal estate of the *Chequer-Inn* in *Holborn*, and only of the trust or equitable [755] estate of certain lands in *Suffolk*, which he had formerly purchased in the name of his brother *Thomas Sutton*, and which on his said brother's death, had descended to his son (the testator's nephew) *Thomas Sutton*, by will dated *July* 1696, charged all his estate with the payment of his debts, and directed his nephew and trustee *Thomas Sutton*, to convey his *Suffolk* lands to the use of his will. (1) Then he devised all his lands in *Suffolk*, and the *Chequer-Inn* in *Holborn*, to his nephew *Thomas Sutton* for life, and afterwards to the first son, or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to his said *nephew*'s second son, and his issue male in tail, (not carrying the limitations over to his third or other sons) (2) and afterwards came this clause (*viz.*) that immediately after the death of the testator's nephew *Thomas Sutton, without issue male of his body*, the premisses should go to trustees for charities.

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(1) Preceding the limitation of the premisses to the nephew for life, &c. was a declaration that if the said nephew should refuse to convey the legal estate of the said premisses to the uses of the will, or to acknowledge the trust thereof in manner therein mentioned, then "all "the gifts, legacies and bequests in the "said will given, devised, and bequeath-"ed to the said *Thomas Sutton, and* "*the heirs male of his body*," should be void. Bro. P. C.

(2) Subject to a proviso, "that the "said *Thomas Sutton* or his assigns "and *the heirs male of his body*, should "not commit waste upon the said pre-"misses, and should not impeach, ques-"tion, or endeavour to defeat, avoid, "destroy, invalidate, or obstruct the "payment of all or any the annuities, "legacies or charitable bequests in the "said will." Bro. P. C.

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Thomas Sutton the nephew suffered a recovery and died without issue, upon which, whether the recovery barred the charities was the question?

For the appellants it was urged, that it was most manifestly the intention of the testator, that his nephew *Thomas Sutton* (who was observed not to be heir at law to the testator) should have no greater estate in the lands in question, than for life only; and accordingly the estate was expressly limited to him *for and during the term of his natural life*, with remainders to his sons as purchasers; that it could not be pretended there were any words in this *will*, which could possibly in a *deed* have created an estate-tail in *Thomas Sutton;* if therefore any such was created, it must be by implication or presumption of
[756] the testator's intention, and not by the legal import or construction of the words themselves; but such an implication was most directly contrary to the express declaration of the testator in almost every branch of the will, as well as destructive of the charities intended by him to be established for ever. That the will (particularly as to the lands in *Suffolk*, the legal estate whereof was vested in the said *Thomas Sutton* in trust for the testator) was only a direction and appointment in what manner the trustee should convey his estate, so as best to answer his intention; and no conveyance thereof having ever been made by the trustee pursuant to such direction expressly given for that purpose in the will, the trust still remained to be carried into execution by the direction and authority of a court of equity, which it was hoped would be so done as to give an entire effect to the intention of the testator expressed in the several limitations contained in the will; and not in such a manner as would put it in the power of the trustee, who ought to have pursued the testator's direction in the establishment of the charities, to destroy them at once, and thereby render useless and ineffectual the greatest part of the provisions made by the will.

That this case was to be compared to that of marriage articles for settling lands on the husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, where the court in ordering the settlement would vary from the words of the articles, and limit the estate strictly to the husband for life, and afterwards to the first and every other son.

Lastly, That here were no creditors or purchasers for a valuable consideration, who could be affected, were the construction contended for, to prevail.

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I argued on the other hand for the respondents: This case may be reduced to few words, (*viz.*) one seised in fee devises his lands to his nephew for life, remainder to his first and second son in tail male successively, without carrying the limitations farther to his other sons; and after his said nephew's death without issue male of his body, then the remainder over to trustees, for charities.

The question is, whether the nephew (who never had any issue male) by suffering this recovery has barred these charities? and I humbly apprehend that he has.

I will begin *à notioribus*, and from what every body must admit: if I devise an express estate to *A.* for life, remainder to the heirs of his body, it can be no question, but that *A.* (notwithstanding the express estate devised to him for life) has yet an estate-tail vested in himself; for it is a rule to which every one must submit, that in all conveyances by deed or will, where an estate for life is limited with (*a*) remainder mediately or immediately to the heirs (or heirs male) of the body of the grantee or devisee; this vests an estate-tail in such grantee or devisee, and the words [heirs, or heirs male of the body] are words of limitation.

(*a*) Vide ante, Hayter v. Rod, 371. and Goodright v. Wright, 399.

My next step shall be to shew that if I devise lands to *A.* for his life, remainder to the *issue male* of the body of *A.* this is an estate in tail male to *A.* because the word [issue] takes in all issue proceeding from the body of *A.* though for ever so many generations, and to the latest posterity. This was determined by all the judges in the exchequer chamber, in Lord Chief Justice *Hale*'s time, in the case of *King* v. *Melling*, 1 Vent. 214. 225. 2 Lev. 58. Where one devising lands to *A.* for life, remainder to his issue male by his second wife, it was adjudged an estate-tail in *A.* and that his recovery barred all the remainders.

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3*dly*, Where lands are devised to *A.* for life, and no express estate to his issue or issue male, but it is only said, in case *A.* dies without issue male, then to *B.* in this case by necessary implication *A.* has an estate-tail because though he has an express estate for life, yet it is as fully expressed in the will, that until *A.* dies without issue male, *B.* shall take nothing, and therefore for mere necessity, the issue male of *A.* after his death must take the lands; consequently it is the same as if the premisses were devised to *A.* for life, remainder to the issue male of *A.* which makes an estate-tail in a will to *A.* in case he at that time had no issue male. And for this I would beg leave to cite 9 Co. 127, 128, (*Sunday*'s case) where one

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devised his lands to his son *William*, and if his son *William* should have no issue male, then to the testator's next son; this gave an estate in tail male to *William*; so in 1 Vent. 230. Lord Chief Justice *Hale* says, that the words [in case *A.* dies without issue male] give an estate-tail to *A.* to which purpose his Lordship there cites *Burley*'s case; and in 1 Mod. 54. in *Love* and *Windham*'s case, it is said by Chief Justice *Kelynge*, that in a devise to *A.* for life, and if *A.* die without issue, then to *B.* these words give *A.* an estate-tail.

The next thing to be considered is, whether the limitations interposed to the first and second son of the nephew *Thomas Sutton* in tail male, make any alteration in the case? Now plainly they do not; for by virtue of the words [after the death
[759] of the testator's nephew without issue male of his body] an estate-tail is created in *A.* and in case he has issue a son, then that estate which was before closed in him, shall open, to let in such first son to take. Thus was *Lewis Bowles*'s case, 11 Co. 80. where a man in consideration of marriage covenanted to stand seised of the premisses, to the use of himself for life, remainder to the use of the first son of the body of him and his wife in tail male, remainder to the second son in tail male, remainder to every other son of that marriage in tail male, remainder *to the heirs of the body of the husband;* this was adjudged a vested estate-tail in the husband, but that upon the birth of a son, the vested estate-tail in the husband would divide, and let in the remainder in tail to the son. So in the principal case, until the testator's nephew *Thomas Sutton* had a son, and while this was a contingent remainder as to such son, the estate-tail vested in the father.

But besides what I have mentioned, there is a case express in point, (*viz.*) that of (1) *Langley* v. *Baldwin*, referred out of Chancery to the Judges of the Common Pleas, during the time of the Lord *Trevor*'s presiding in that court, where there was a devise to *A.* for life without waste, with a power for him to make a jointure, remainder to his first, second, and so to his sixth son, (and no farther) after which followed the same words as here, [if *A.* should die without issue male of his body, then to *B.* in fee]; and in that case it was resolved by all the judges of *C. B.* that there being no limitation beyond the sixth son, and for that there might be a seventh, who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, (but still to take as

(1) 1 Eq. Ca. Ab. 185. pl. 29.

issue and heirs of the body of *A.* in tail by descent and not purchase) the Court held the words [in case *A.* should die without issue male of his body] did, in a will, make an estate-tail. This was a solemn case adjudged in the very point, and liable to all the objections which can be made to the present one, (*viz.*) that there was an express estate for life devised to *A.* notwithstanding which, these words [in case *A.* should die without issue male] were adjudged to give him an estate-tail.

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Your Lordships will give me leave to observe, that there is an apparent difference between this case of *Baldwin* and *Langley* and that of (*a*) *Bampfield* and *Popham*, which is wrong reported in Salk. 236. for there the devise was to *A.* for life, remainder to his first, *&c.* sons in tail male successively, extending to every son that thereafter might be born of the body of *A.* (so that if *A.* should have had ever so many sons, they all would have had a possibility of taking) and then came the words [and if *A.* should die without issue male of his body, then to *B.*] here it was adjudged that these words should not make an estate in tail male by implication in *A.* because there was no occasion for such construction, since every issue male might take by the devise to all the sons in remainder, so that the words [in case *A.* should die without issue male] were to be intended *such* issue male; and should not, when vainly inserted, and when they could not operate or be of use, merge and destroy an express estate for life; but in the principal case, these words have their use, (*viz.*) to let in the third and every other subsequent son born to the testator's nephew *Thomas Sutton*, and therefore shall make an estate-tail by implication in him. Besides, this case is still stronger from the particular penning of the will, the whole tenor whereof shews it to have been the testator's intent to give an estate in tail male to *Thomas Sutton*, the nephew, it being said in one part of the will, that if the nephew should refuse or omit, within a year, to convey the trust estate in the *Suffolk* lands (the legal estate of which he was entitled to as heir to the testator's brother and trustee) to the uses in the will mentioned, then the gift to him the said nephew, and the heirs male of his body should be void; which plainly shews that the testator himself thought he had given the premisses in tail male to his nephew, by words tantamount, or importing the same, as if given to him and the heirs male of his body.

(*a*) Ante, 54.

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Again, the conditional proviso annexed to the devise *that he*

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should do no waste, is an argument he intended him an estate-tail; for if the testator had given a bare estate for life, he, of course, could not have done waste, but he had been punishable for it by the next remainder-man in tail or fee. Also the other proviso that the nephew *should not alien, or endeavour to alien*, shews that the testator intended him more than an estate for life, for otherwise he could not alien; but when the testator recollected that he had given him an estate-tail by virtue of which he had a power to alien, he thought it necessary to annex a condition which he might imagine a good one, and would really be so, to restrain a feoffment and (*a*) discontinuance, but not a recovery.

(*a*) 1 Inst. 123.

As for the remainder to the charity, that being subsequent to an estate-tail, was plainly at the mercy of the tenant in tail to bar by a recovery; for so are all estates subsequent to an intail, unless such as are in the Crown, whether they belong to charities, infants or feme coverts; and if the law were otherwise, the greatest inconvenience would follow, perpetuities would be introduced, and it would become usual in settlements of great estates, after a limitation to all the male line to give them to a charity, by which means a perpetuity would be created, since none would buy if the charity could not be barred. This was the case of Sir (*b*) *Gilbert Gerrard* v. *Godfrey Woodward*, where Sir *Gilbert* married one of the coheiresses of Sir *Thomas Spencer* of *Yarnton* in the county of *Oxford*; but the estate being vested in trustees for the Lady *Gerrard* in tail, remainder to a charity, Sir *Gilbert* and his lady suffered a recovery to the use of Sir *Gilbert* in fee; and Sir *Gilbert* and his wife afterwards dying without issue, the heir general, or assignee of the heir general of Sir *Gilbert*, brought a bill in the *Exchequer* against the trustees and against the charity, for a conveyance of the legal estate, which the Court of *Exchequer* decreed accordingly, though to the utter defeating of the charity.

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(*b*) See this case cited 2 Vern. 428.

As to the last point in this case, that of the trust of the *Suffolk* lands, it has been objected that, being only a trust, a creature of equity, and a direction by the testator to convey this equitable interest, according to the limitations in the will, equity will mould it in such a manner, as best to preserve the intentions of the party, and have it so conveyed, as that the nephew may never have it in his power to bar either his own sons or the charity; that without equity, neither the nephew nor any other can come at the legal estate, and for equity to assist in destroying a charity is said to be hard. That equity

must do something to aid the will, is plain; for if a conveyance of the trust estate were to be ordered in the very words of the will, such words, if in a deed, will not convey an estate-tail to the nephew, but there must be the words [heirs male of the body of the nephew,] and this will containing a direction to convey, is insisted to be executory, and compared to articles to settle lands upon a marriage on the husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife; in which case it has been adjudged, [763] (and particularly in the great case of (*a*) *Trevor* v. *Trevor*) (*a*) Ante, 622. that when equity is to order the settlement, it will decree an estate for life to the husband, with remainder to trustees to support contingent remainders, remainder to the first son, *&c.* in strict settlement, and not impower the husband to break it the very moment it is made, which in the principal case is urged to be the stronger, as here is no purchaser or creditor likely to suffer by such construction.

To which I answer, that were this the case of articles to settle lands on marriage on the husband for life, remainder to the heirs male of the body of the man by the woman, the construction equity would put upon it, would be to have the lands settled (after an estate for life to the father) upon the first, *&c.* son of the marriage; but there is a wide difference betwixt articles and a will. A will is the voluntary act and disposition of the party, but articles of marriage are made upon a valuable consideration. In case of articles, two parties are contracting together, and making a bargain, and come to have an execution thereof decreed, under which circumstances the court cannot do justice, without going according to the meaning of each party. It is then a thing in *fieri*, and in its nature perfectly executory: but in case of a devise, though of a trust, yet it is to be construed by the same rules as where an estate is devised, else it would breed the utmost confusion, none would know how to advise, or what opinion to give on wills, where very often the trust estate is out of the devisor; it would be strangely inconvenient if the devisee under the same will, by the same words, and in the same clause too, shall at law be tenant in tail, and in equity construed to be tenant for life only.

With regard to the directing clause in the will, that the [764] trustees should convey, that can be no handle for a court of equity to make a different construction of a devise of a trust, than it would of a devise of an estate; for every devise of a trust implies a direction to the trustees to convey the premis-

ATTORNEY GENERAL v. SUTTON.

ses in manner as the will disposes, *et expressio eorum quæ tacite insunt nihil operatur*; and as the remainder in fee to the charities, is admitted to be well barred with respect to the *Chequer-Inn*, wherein the testator had a legal estate, so was it intended by him that both should go and be enjoyed together.

(*a*) Ante, 142.

In the case of *Bale* and *Coleman* (*a*) decreed by Lord *Harcourt* in 1711, where a man devised his lands to trustees for payment of his debts and legacies, and after such debts and legacies paid, the trustees were directed by the will to convey the premisses to *A.* for life, with power to make leases for 99 years, remainder to the heirs male of his body, though this was but a trust and a direction to convey, and though the question arose upon a will, and an express estate was given to *A.* for his life, with power to make leases for 99 years; yet was it decreed, that an estate-tail passed by the will to *A.* And in this case the court having taken a diversity between a direction by a will to convey and articles in consideration of marriage, held that in the latter case only, equity, which was to execute the articles between the contending parties, would go according to their meaning and intention, without having a strict regard to the words.

Upon the whole, for these reasons, and in regard to so many and great authorities, the reversing of which would shake the titles of many subjects of this kingdom, I am to pray your Lordships that the order of the court of *Exchequer* may be affirmed.

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Whereupon, after the withdrawing of the counsel from the bar, all the Lords agreed, that as to the *Chequer-Inn*, wherein the testator *Sutton* had a legal estate, the recovery was clearly good, and barred the charities:

But with regard to the trust estate in the *Suffolk* lands, and which the will directed should be settled to the same uses as the *Chequer-Inn* was devised, some of their Lordships doubted, that there being a direction for the trustees to convey, this gave a handle to a court of equity to interpose, (*z*) and if the court was to interpose, it was fit and reasonable to help the intention of the party, which was but imperfectly expressed in the will; that this assistance should be given in respect to the remainder limited to the first and second sons of the testator's nephew *Thomas Sutton*, by ordering an estate to trustees

(*z*) As to the difference between trusts executed, and executory, see *Papillon* v. *Voice*, post. Vol. II. 278.

during the life of the nephew, and so to put it out of his power to bar these remainders to the first and second son; that none could blame the doing of this, which was an apparent compliance with the testator's intent; and as the charities were intended to take effect in case only the nephew should die without issue male, it would be equally just to preserve and assist such intention by limiting a remainder to every other of the sons of *Thomas Sutton* the nephew to the trust estate, and then a remainder to the charities.

But other Lords differed, being of opinion that equity, as to limitations of estates or trusts of estates, ought *sequi legem*, and that were it otherwise, it would be highly inconvenient, and occasion the greatest uncertainty, and most precarious determinations of property; particularly the Lord *Harcourt* cited the following expression of Mr. Justice *Twisden*, who, when a matter was pressed in behalf of a charity that he thought to be against law, replied, *I like charity well, but will not steal leather to make poor men shoes.*

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However, some of the law Lords differing in opinion, the *Bishops* made a majority for reversing the order of the Court of Exchequer as to the whole, which was thought not to be very mischievous, as the order of that court was but to allow the plea, and consequently the reversal thereof did only put the respondents to answer over, without determining the right any ways against them.†

† In consequence of this order made by the House of Lords the defendants answered, and on the 29th of *January* 1732, the cause by the name of the *Attorney General* v. *Young et al'.* (*Payman* being then dead) came on in the Exchequer, where the Barons decreed, that the recovery suffered by the testator's nephew *Thomas Sutton* of the trust estate was void, the same being contrary to the trust created by the will of *John Sutton*, and for that there had not been any conveyance of the said premisses to trustees pursuant to the directions in the said *John Sutton*'s will, and that the defendants should convey to the trustees for the charity, and awarded a perpetual injunction to quiet them in the possession.

With respect to the *Chequer-Inn*, the court retained the information, with liberty to either of the parties to ascertain their title by trial at law; upon which the *Suttons* (who claimed under the recovery) brought their ejectment in the court of Exchequer, which was tried in *Hilary* Vacation 1735, and the jury found a special verdict, *viz.* the said *John Sutton*'s will, and all facts necessary to bring the matter of law before the court; and in *Easter* Term 1737, the special verdict was argued: in the term following the court gave judgment for the lessors of the plaintiff, being of opinion that *Thomas Sutton* the nephew took an estate-tail in the *Chequer-Inn*, and on the 22d of *June* 1737, the court ordered the tenants to attorn, *&c.* to the *Suttons*.

CASE 220.

COMBER'S CASE.

LORD MACCLESFIELD.

An executor bringing a *sci. fa.* to revive a decree, must shew he has proved the will; and there being *bona notabilia* in divers dioceses, if he shews proof of the will in the spiritual court of one of the ordinaries, this is not good; but in such case the proof must be in the court of the archbishop.

THE plaintiff brought a *sci. fa.* to revive an old decree obtained against the defendant by the plaintiff's testator about 23 years since.

[767] The defendant pleaded in bar to the *sci. fa.* that the plaintiff's testator after he had recovered this decree lived 15 years in the same town with the defendant, and never asked him for the money; but on the contrary told him that he should never be troubled for it, and that he acquitted him thereof, (without suggesting any deed or writing for that purpose.) Also the defendant farther pleaded, that the plaintiff in the original cause (who appeared by the *sci. fa.* to be since dead) died possessed of *bona notabilia* in two dioceses within the province of *Canterbury*, viz. in those of *Chichester* and *London*; and that the executor having proved this will only in the archdeaconry of *Surrey*, such probate was void, and that therefore he ought not to be admitted to sue.

It was argued for the plea, that though an executor might (*a*) release before probate, yet he could not sue; and that the (*b*) courts of law or equity took no judicial notice of any executor until he had proved the will, for which reason, if an executor should die before probate, leaving an executor, this executor would not be so to the first testator; but an administration must be granted *de bonis non*, &c. Whereas if the first executor had proved the will, then his executor would have represented the first testator; and that if the will was not duly proved now, in all likelihood it never would; for this being a *sci. fa.* to have an execution of a decree, here was to be no bill; but after reviving the suit the common process would issue for the execution of the decree.

(*a*) Co. Lit. 292. b.

(*b*) Vide ante, the case of Humphreys v. Ingledon, 753.

Lord Chancellor: If this had been an administration granted by the archdeacon or ordinary where there were *bona notabilia* in divers dioceses, the administration had been merely void; for the administrator receives his right entirely from the administration, but the right of the executor is derived from the will, and not from the probate, as appears from an executor's having power to release or assign any part of the personal estate before probate; and a defendant at law cannot plead to any action brought by an executor, that the plaintiff

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has not proved the will; though it is true he may demur, if the plaintiff does not in his declaration shew the probate. COMBER'S CASE.

However, let not the plaintiff in this *sci. fa.* proceed any farther in his suit without shewing the defendant a sufficient probate of the will, and without the farther leave of the court, in respect of the staleness of the demand.

MIDDLETON *versus* LORD ONSLOW *et al'*. CASE 221.

ONE Mr. *Hockenel* married one of the daughters and coheirs of Mr. *Middleton* without the consent or privity of her relations, and being much in debt, absconded in privileged places for fear of his creditors, but being a young gentleman in hopes of some employment, and his wife entitled to a portion of about 5 or 6000*l.* in the hands of her trustees, she with her trustees petitioned the *Master of the Rolls*, that they might make proposals to Mr. *Hockenel*'s creditors touching the composition of his debts, and that thereupon the trustees might be at liberty to apply any sum not exceeding 500*l.* for that purpose; and Mrs. *Hockenel* the wife being in court, consented that the trustees * should dispose of 500*l.* of her portion for the purposes aforesaid.

At the Rolls. 2 Eq. Ca. Ab. 254. pl. 3. 259. pl. 2. If on the consent of the wife and her trustees, and in order to a composition with the husband's creditors, the court orders part of the trust-money to be paid to the creditors thus consenting to discharge him of the debts, any private

notes, &c. taken by any of the creditors for part of their debts, besides their share with the rest of the creditors, will be set aside.

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Several of the creditors (to the number of about fifty) signed the deed of composition to take 7*s.* 6*d.* in the pound; but about seven of the creditors (being the remainder of them) delayed the execution of the deed of composition until the last day, and then executed it; but at the same time took notes and bonds from Mr. *Hockenel*, to pay the rest of the money at a future day, some of which were post-dated, and bore date after the deed of composition, some made to other persons in trust, and others made payable to the creditors or order by way of promissory notes; and in the deed of composition, the petition and the order of court were recited.

And now Mrs. *Hockenel* and her trustees petitioned the *Master of the Rolls*, that the creditors might deliver up and discharge all these securities.

Cur': I should not, nor indeed could I compel any honest creditor to compound his debt; but when they have compounded and agreed to accept of 7*s.* 6*d.* *per* pound, and by

MIDDLETON v. LORD ONSLOW.

suggestions that Mr *Hockenel* was to have his liberty, have induced the court to give way, and the wife to consent that part of her portion, which was not before liable to these debts, should be applied to this purpose, and have prevailed upon the trustees to give away part of the portion to the creditors, and afterwards, on the last day mentioned in the deed of composition (which provided that the whole deed should be void unless sealed by all the creditors by such a particular time) have come in to take advantage of the necessities of the husband, and to gain these underhand securities; as they thereby defeat the intent of the order of court authorizing the trustees to
[770] compound; as they disappoint the wife, who, in hopes of her husband's liberty, consented that part of her portion should be applied to the discharge of his debts, and as they frustrate the intention of the trustees, who in confidence of the husband's having his liberty, have paid away part of the portion towards the debts; this underhand dealing of the creditors is a fraud on the wife, on the trustees, and on the court; for which reason let all such securities be set aside and delivered up by the creditors to the husband Mr. *Hockenel*. (1)

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(1) Vide *Spurret* v. *Spiller*, 1 Atk. 105. *Earl of Chesterfield* v. *Jansen*, 2 Vez. 156. (*z*) *Cockshot* v. *Bennet*, 2 T. R. 763.

(*z*) 1 Atk. 352, S.C. and see *Child* v. *Danbridge*, 2 Vern. 71. *Mawson* v. *Stock*, 6 Ves. 300. *Dalbiac* v. *Dalbiac*, 16 Ves. 125. *Daubeny* v. *Cockburn*, 1 Mer. 626. and cases collected in the notes to *Lewis* v. *Chase*, ante 620. and *Roberts* v. *Roberts*, post. Vol. III. 74.

CASE 222.

HAWKINS *versus* HOLMES.

LORD MACCLESFIELD. 2 Eq. Ca. Ab. 50. pl. 24. One alters a draught with his own hand for the purchasing an estate; this not a signing to take it out of the statute of frauds, though the seller afterwards executed the conveyance, and caused it to be registered.

THE plaintiff agreed with the defendant to sell him a house for 640*l.* and by consent of both parties an attorney was employed to make a draught of the conveyance: which the attorney accordingly prepared and sent to the defendant, who made several alterations therein, and delivered it back to the attorney to be ingrossed; whereupon a time was appointed for the plaintiff and defendant to meet at a tavern to execute the writings, and for the latter to pay the money.

The plaintiff and his attorney came to the tavern, where the plaintiff executed the writings, and having got the conveyance registered (the house being in *Middlesex*) brought this bill against the defendant to compel him to pay the purchase-money.

As to such part of the bill, as sought to compel the defendant to accept the purchase and pay the money, the defendant pleaded the statute of frauds and perjuries, and said, "that neither he, nor any by him lawfully authorized, signed [771] "any writing, agreement, memorandum or note in relation "to this purchase, or whereby the defendant any ways agreed "thereto."

For the plaintiff it was objected, that the defendant's altering the draught with his own hand, was as a signing, it not being material to what part (1) of the draught he had set his hand, and in this case the contract must be looked upon as carried into execution, the plaintiff having executed the deeds of conveyance, and registered them in the proper office.

To which it was answered, that the statute requires that the party or some person by him lawfully authorized, should sign the writing; and though the defendant had altered the draught with his own hand, yet this could not be called a signing, that the statute requires signing as a material circumstance, which is not to be dispensed with in equity, any more than at law; that if the defendant had himself wrote over the whole deed with his own hand, without signing it, this had not been sufficient, for the statute has made signing absolutely (2) necessary for the completion of the contract; for which purpose I cited the case of† *Ithel* v. *Potter*.

† Determined at the Rolls *Trin.* 1719. on the very same point.

(1) This point received the opinion of the court of Exchequer in *Stokes* v. *Moore*. (*z*)

(2) But a letter referring to, and promising to perform, a written agreement, though not signed, is sufficient to take the case out of the statute. *Tawney* v. *Crowther*, 3 Bro. C. C. 318. (*y*)

(*z*) 1 Cox, 219. and see *Welford* v. *Beazely*, 3 Atk. 503. *Coles* v. *Trecothick*, 9 Ves. 234. *Morrison* v. *Turnour*, 18 Ves. 175. *Ogilvie* v. *Foljambe*, 3 Mer. 53. *Selby* v. *Selby*, ib. 2. *Shippey* v. *Derrison*, 5 Esp. N. P. C. 191. *Schneider* v. *Norris*, 2 M. & S. 286.

(*y*) As to the authority of *Tawney* v. *Crowther*, see *Clinan* v. *Cooke*, 1 Sch. & L. 33. And see *Foster* v. *Hale*, 3 Ves. 696. *Coles* v. *Trecothick*, 9 Ves. 250. *Blagden* v. *Bradbear*, 12 Ves. 471. *Hinde* v. *Whitehouse*, 7 East, 558. *Saunderson* v. *Jackson*, 2 Bos. & P. 238. *Allen* v. *Bennett*, 3 Taun. 169 *Western* v. *Russell*, 3 V. & B. 187.

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Lord Chancellor: Unless in some particular cases where there has been an execution of the contract by entering upon and improving the premisses, the party's signing the agreement is absolutely necessary for the compleating of it; and to put a different construction upon the act, would be to repeal it; as to what has been insisted upon in relation to the plaintiff the vendor's executing and registering the deeds, this in-

[772] deed looks artful on the plaintiff's side, but is all of it immaterial, with respect to the defendant, to whom the other could not convey or vest an estate in him against his will: it is true, the plaintiff's having registered the conveyance may put a difficulty on him how to get back the estate; but it being his own doing, and with a design to fasten the estate on the defendant, he must thank himself for it. (1)

His Lordship moreover laid a stress on what the defendant mentioned in the answering part, wherein it was sworn that it had been agreed between the plaintiff and the defendant, that the latter might be off at any time, on paying the charge of preparing the writing, which the defendant said he was willing to do. (2)

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(1) Where one party has been permitted by the other to act upon a parol agreement, it is considered as a species of fraud in the latter to insist upon the statute as a bar to a specific performance of the whole agreement. Vide *Hollis* v. *Edwards*, 1 Vern. 159. *Butcher* v. *Stapely*, ib. 363. *Foxcroft* v. *Lyster*, (cited) 2 Vern. 456. (*z*) *Lamas* v. *Bayly*, 2 Vern. 627. *Floyd* v. *Buckland*, 2 Freem. 268. *Savage* v. *Foster*, 9 Mod. 37. Lord *Pengall* v. *Ross*, 2 Eq. Ca. Ab. 46. pl. 12. *Anon.* ib. 48. pl. 16. *Lockey* v. *Lockey*, Pre. Cha. 519. *Seagood* v. *Meale*, Pre. Cha. 561. *Clerk* v. *Wright*, 1 Atk. 12. *Lacon* v. *Mertins*, 3 Atk. 4. *Earl of Aylesford*'s case, 2 Stra. 783. *Gunter* v. *Halsey*, Amb. 586. *Whaley* v. *Bagenal*, 6 Bro. P. C. 45. *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404. (*y*)

(2) In what cases and in what manner the statute of frauds may be pleaded to a bill for the performance of a parol agreement, vide in *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404. (*x*) *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559, and the cases there mentioned. (*w*)

(*z*) Colles P. C. 108.

(*y*) *Pym* v. *Blackburn*, 3 Ves. 34. *Buckmaster* v. *Harrop*, 7 Ves. 341. 13 Ves. 456. S. C. on ap. *Clinan* v. *Cooke*, 1 Sch. & L. 22. *Davis* v. *Hone*, 2 Sch. & L. 341. *Harnett* v. *Yielding*, ib. 556. *Frame* v. *Dawson*, 14 Ves. 386. *Gregory* v. *Mighell*, 18 Ves. 328.

(*x*) 2 V. & B. 153. note.

(*w*) *Moore* v. *Edwards*, 4 Ves. 23. *Cooth* v. *Jackson*, 6 Ves. 12. *Evans* v. *Harris*, 2 V. & B. 361. It is now settled that a defendant by answer admitting a parol agreement, may yet insist on the Stat. as a bar to its performance, *Blagden* v. *Bradbear*, 12 Ves. 466. *Rowe* v. *Teed*, 15 Ves. 375. If however, he do not insist on it in his answer to an original bill, he cannot afterwards avail himself of it as a defence to an amended bill, *Spurrier* v. *Fitzgerald*, 6 Ves. 548. And see *Wrottesley* v. *Bendish*, post. Vol. III. 239.

DE TERM. S. HILLARII, 1721.

HERBERT *et al' versus* THE DEAN AND CHAPTER OF WESTMINSTER AND DR. BRODERICK, *et è contra.*

CASE 223.

2. Ch. Hlees. 75

UPON the plague which happened in the year 1625, the church-yard of St. *Margaret's Westminster* not being large enough to bury the dead parishioners, the inhabitants of that part of the parish, which now resorts to the new chapel built there, petitioned the dean and chapter of *Westminster* (who were lords of the manor) to grant them a waste piece of ground to bury their dead, which accordingly the dean and chapter did under their seals, (*z*) and it was solemnly consecrated; afterwards these inhabitants were at the charge of building a chapel there, having first obtained a royal licence for that purpose. The vestry-men and chapel-wardens had ever since the year 1653 elected the ministers who were to preach there; but now the dean and chapter of *Westminster* claimed a right to name the minister who should preach and do divine service in this chapel. (*y*)

(*z*) They "did by their deed poll for ever freely give assign and dedicate to God and the church." Reg. Lib.

(*y*) The dean and chapter were rectors appropriate of the parish. The chapel was begun about the year 1635, leave having been first obtained from the dean and chapter. It was built partly by a legacy from one of the inhabitants, partly by subscription, and partly by a rate levied on the parishoners, and was finished between the years 1639 and 1642. The dean and chapter alleged that soon after the commencement of the rebellion in 1642, the then dean and chapter were deprived of any opportunity of asserting their right of nominating the minister: that from 25 *May* 1642, there was no entry in their books of any capitular act till after the restoration, and that during that time many of the evidences relating to their estates and rights were lost: that after the restoration the then dean and chapter, who were different persons, were not fully apprised of their right of nomination till 1698, when, having discovered that the grant and act of consecration were in possession of the churchwardens, they appointed their subdean and three prebendaries to meet some of the pretended vestrymen of the new chapel to treat about the right of nomination, in order to accommodate the dispute in a friendly manner; and Dr. *Smallridge*, who then officiated in the chapel, being greatly esteemed by the dean and chapter, and by the gentlemen who resorted to the chapel, it was proposed by the gentlemen then present that all the then disputes about the right of nomination should be laid aside for the present, and that Dr. S. should continue minister, without prejudice to the right of nomination. The dean and chapter acquiesced till the death of Dr. S. in 1719,

HERBERT *v.* THE DEAN AND CHAPTER OF WESTMINSTER.

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On a bill brought to settle the right of nominating the parson of this chapel; and on a motion by the * defendants that the plaintiffs might produce the vestry books before a Master, for the defendants if they pleased to take copies; it was objected, that the plaintiffs ought not to be ordered to produce their evidence; for that this case was not like that of a lord of a manor producing his court-rolls to the tenant, because the lord, as to the court-rolls, is a trustee for the tenant; whereas one, not a tenant, cannot oblige the lord to produce his court-rolls; and here the dean and chapter are strangers.

Lord Chancellor: When the dean and chapter gave this ground, they did not reserve any power to nominate the preacher; and the inhabitants of the chapelry were at the expence of building the chapel. Now the building and (*a*) endowing of the church, was what at common law originally entitled the patron to the patronage; here the inhabitants built the chapel, and (as appears) by the pew-money have endowed it. It is not reasonable to say that the dean and chapter, as parson appropriate, have a right to supply every chapel built within the parish with a preacher; it would be an expence and hardship upon them to be obliged so to do; neither ought it to be at their election to supply it: for suppose I build a chapel in my house for myself, the parson is not bound to provide for it; or suppose I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there? I think not; and it will make no alteration, if the chapel which I build in my own ground, be intended for the use of twenty neighbours besides my own family.

Building and endowing of a church, did originally entitle the patron to the patronage. Impropriator of a parish has no right to nominate a preacher to every chapel within the parish; it might be a hardship if he should be bound so to do; neither ought it to be at his election. One may build a private chapel for himself and family, or for himself and neighbours, or for himself and twenty neighbours, and this will not give the parson a right to nominate a preacher there.

(*a*) 1 Inst. 17. b. 119. b.

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As to the motion, that the plaintiffs should produce the vestry-books before a master, since they in their answer to the cross bill refer thereto, and by that means make them part of their answer, referring to them (as it is said) for fear of a

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when they nominated Dr. *Broderick*, and granted him a lease of the chapel and burial ground for 21 years, determinable on his death, or ceasing to be minister of the chapel, who brought an ejectment.—The defendant Dr. *Onely*, one of the prebendaries, stated that the dean and chapter, as rectors, had the right of nominating a curate for life to the parish, in which right they nominated him as curate in 1683, and that he was still possessed of the curacy, "but whether he has thereby any right "to the nominating of a minister to the "said new chapel he does not take upon "himself to determine, but in case any "such right shall appear, hopes the "court will preserve it to him." Reg. Lib. A. 1721. fo. 162.

mistake; for that reason the court ought to let the defendants see them; otherwise there would be no relying upon the answer of those who are thus guarding themselves by references for fear of a mistake, and to avoid exceptions to their answer: wherefore, for that the plaintiffs, who were bound to hear their cause in a short time, have the favour and aid of the court by an injunction, and to the intent that the cause may come more fully before the court at the hearing, let them bring the vestry-books before the master, and the defendants who are plaintiffs in the cross cause, if they please, take copies. (*z*)

HERBERT *v.* THE DEAN AND CHAPTER OF WESTMINSTER.

But (*b*) afterwards on the hearing, the Court decreed that the right of nomination of the minister did belong to the dean and chapter. (*y*)

(*b*) 1 March 1721.

(*z*) See *Bettison* v. *Farrington*, post. Vol. III. 363.

(*y*) See *Dixon* v. *Kershaw*, Amb. 528.

COLEMAN *versus* WINCH.

CASE 224.

A. Seised in fee of lands makes a mortgage to *B.* for 100*l.* and afterwards borrows 100*l.* more of *B.* upon bond, and dies; the heir at law conveys the inheritance and equity of redemption of the premisses to trustees, in trust for payment of all the bond and simple-contract debts of his father equally; after which the trustees bring their bill to redeem *B.* who insists on being paid his debt by bond, as well as that by mortgage; and for the mortgagee it was objected,

LORD MACCLESFIELD. 2 Eq. Ca. Ab. 498. pl. 19. Pre. Cha. 511. One seised in fee mortgages to *A.* and afterwards binds himself and his heirs by bond to *A.* and dies; if the heir comes to redeem this mortgage, he must pay the bond debt as well as the mortgage, but if the heir assigns the equity of redemption to *J. S.* who brings his bill to redeem, he shall pay the mortgage only, and not the bond.

First, That as he had the estate at law absolutely, and the trustees could not come at it without the interposition of equity, it seemed not agreeable to reason, that he should be hindered by this court from receiving what was due to him by bond as well as by mortgage, the former being as just a debt, and as much due in conscience as the latter. [776]

Secondly, That if the heir had brought a bill to redeem the mortgage, it was plain he must have paid as well the bond-debt as that by mortgage; and if the heir must have paid it, why should any one claiming under him, be in a better condition than he himself?

COLEMAN v. WINCH.

Lord Chancellor: The bond of the ancestor, wherein the heir is bound, becomes upon the ancestor's death the heir's own debt, for which he is suable in the *debet* and *detinet*; and therefore if he comes to redeem the mortgage made by his ancestor, he must pay the debt by (1) bond, as well as that by mortgage; but though this be the debt of the heir, it cannot be said to be due from the heir's assignee, the bond being no lien upon the land (*y*): which appears most plainly, in that it was no lien on the land, even against the † mortgagor himself who happened to be indebted to the same person by mortgage and by bond. Suppose one be indebted to *A.* by mortgage of a term for years, and also indebted to him by bond; if on the death of the mortgagor, his executor brings a bill to redeem the * mortgage, he must pay both; but if the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, *he* shall only (3) pay the mortgage money. So if the testator being possessed of a term mortgages it to *A.* and becomes also indebted to *A.* by simple contract and dies, his executor bringing a bill to redeem, shall pay both

So if one possessed of a term for years, mortgages it to *A.* and afterwards becomes indebted by simple contract to *A.* and dies, the executors shall not redeem without paying as well the note as the mortgage; *secus* if any creditor of the testator brings his bill to redeem.

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† *Quære tamen;* for in the case of *Baxter* v. *Manning*, 1 Vern. 244, it was decreed by Lord Keeper *North*, that where the mortgagee lent more money to the mortgagor on bond, the mortgagor should not redeem without paying the bond-debt as well as the mortgage; and yet in the case of *Challis* v. *Casborn*, Pre. Cha. 407. it was laid down by counsel for a rule, and agreed to by Lord *Cowper*, that the mortgagor himself is in such case to be let into a redemption upon payment of the mortgage money only; (*x*) though possibly there may be some difference, as to the rule of the court, between a mortgagor's coming to redeem and a mortgagee's bringing his bill to foreclose. (2)

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(1) *Shuttleworth* v. *Laycock*, 1 Vern. 245. *Powis* v. *Corbett*, 3 Atk. 556. *Troughton* v. *Troughton*, 1 Vez. 87. So, shall devisee within the statute of fraudulent devises, *Challis* v. *Casborne*, 1 Eq. Ca. Ab. 325. pl. 9. Otherwise, where the devise is for payment of debts, *Heames* v. *Bance*, 3 Atk. 630. Nor shall a mortgagee be permitted to tack his bond, as against other specialty creditors, in the course of administration of legal assets. *Lowthian* v. *Hassel*, 3 Bro. C. C. 162. (*z*)

(2) Vide *Morrett* v. *Paske*, 2 Atk. 53. *Archer* v. *Snatt*, 2 Stra. 1107. *Anon.* 2 Vez. 662.

(3) *Vanderzee* v. *Willis*, 3 Bro. C.C. 21.

(*z*) *Hamerton* v. *Rogers*, 1 Ves. jun. 513. *Adams* v. *Claxton*, 6 Ves. 226. And see *Brace* v. *Marlboro'*, post. Vol. II. 491. *Latouche* v. *Dunsany*, 1 Sch. & L. 137. *Jones* v *Smith*, 2 Ves. jun. 376. *Ex parte Herbert*, 13 Ves 183. overruling *Collet* v. *De Golls*, Ca. temp. Talb. 65. *Willie* v. *Lugg*, 2 Eden, 78.

(*y*) *Adams* v. *Claxton*, 6 Ves. 226.

(*x*) So *Jones* v. *Smith*, 2 Ves. jun. 376.

the mortgage (1) and the debt by simple contract, because the very equity of redemption is assets to pay simple-contract debts; but if any creditor of the testator brings a bill to redeem this mortgage, he shall pay only the mortgage. COLEMAN v. WINCH.

Lord Chancellor farther said, that the law of *England*, in suits against heirs, imitated the civil law; where an heir sued by a bond-creditor is sued as for his own debt in the *debet* and *detinet*, and is *primâ facie* supposed to have assets, but that the heir might discharge himself by saying, that at the time of the writ brought he had no assets, or if he has assets descended, may shew those assets, of which the plaintiff may, if he pleases, take judgment; and that in case the heir had aliened before action brought, though at law there was no remedy against him, yet in equity he was responsible for the value of the land aliened; but now the heir is made liable at law (*a*) for the value of the assets he has aliened.

(*a*) By 3 & 4 W. & M. c. 14.

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(1) So, *Anon.* 2 Vern. 177. *Demandray* v. *Metcalf*, Pre. Cha. 419.

1. Rep. Ch. 433.

8. Ciu. 172.

3. Bea. 574. SAVILE *versus* BLACKET. (2) CASE 225.

A Settlement of lands was made to the use of *A.* for 99 years if he should so long live, remainder to trustees during the life of *A.* &c. remainder over, with a power to *A.* to charge the lands with * divers sums of money. *A.* the trustees and the remainder-man in tail join in suffering a recovery, and declaring new uses thereof, *viz.* to the use of *A.* for life, with remainder over.

LORD CHANCELLOR MACCLESFIELD.

2 Eq. Ca. Ab. 568. pl. 2. 672. pl. 6. Tenant for 99 years, if he so long live, with power of charging the premisses with sums of money, joins in suffering a recovery, and declares the uses thereof: this extinguishes the power of charging the estate.

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(2) This case now came on upon an exception to the master's report, and also for further directions. The point on the exception was this—Sir *Edward Blacket*, late father of the two plaintiffs *Henrietta Savile* and *Alithea Blacket*, by his will of the 9th of *April* 1718, gave to his said two daughters 2000*l.* a-piece to be paid in the manner therein mentioned (*i. e.*) 500*l.* a-piece part thereof he directed to be charged upon and raised out of the premisses comprised in his marriage settlement, and which lands (as he declared) he had a power by the settlement, to charge with 1000*l.* It having been referred to the master to inquire and state what premisses were liable to such charge, the master found "That by indentures of lease and release dated 24th & 25th *Nov.* 1676,

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Lord Chancellor: This joining of *A.* in making the new settlement without reserving a power to charge the premisses with the said money, has destroyed that power which *A.* had of charging; for the contrary construction would enable him to defeat his own grant.

(being the marriage settlement of Sir *Edward Blacket*, plaintiff's father,) Sir *Edward* had an estate in all the lands in the county of *Northumberland*, (mentioned in the cause) for 99 years, if he should so long live, *sans waste*, and *from and after the determination of that estate*, they were limited to the use of *A.* and *B.* during the life of Sir *Edward*, to preserve contingent remainders, and that after the death of Sir *Edward* the lands were charged with a yearly rent of 500*l.* to the intended wife for her jointure, remainder to the first and other sons of the said marriage in tail male, with divers remainders to other parts of the family, remainder to the right heirs of Sir *William*, father of Sir *Edward*. And that by the said settlement Sir *Edward* had a power, in case there should be one or more daughters, and a son or sons of the said marriage, by deed or will, to charge all or any part of the said premisses with any portion or sum of money not exceeding 1000*l.* to such daughter or daughters. That by indenture of 27 *Jan.* 1704, made between Sir *Edward* of the 1st part, *A.* and *B.* of the 2d part, and *William Blacket* eldest son and heir apparent of Sir *Edward* of the 3d part, reciting the limitations to Sir *Edward* for 99 years, and to *A.* and *B.* as trustees to preserve, *&c.* they the said trustees, with the privity and consent of Sir *Edward* (testified as therein mentioned) yielded up and surrendered to *William Blacket* and the heirs male of his body, all the estate, term and interest limited to them and their heirs as aforesaid. That by indentures of lease and release of 28 and 29 *July* 1709, made between Sir *Edward* and *William*, his son, and *Diana* the son's wife of 1st part, *C.* and *D.* of 2d part, *E.* and *F.* of 3d part, *G.* and the said *A.* (surviving trustee of the settlement of 1676) of the 4th part; and *H.* and *I.* of 5th part; in consideration of a marriage had between *William* and *Diana*, and of 8000*l.* her marriage portion, the said Sir *Edward*, *William* and *Diana* granted, released, *&c.* to *C.* and *D.* all the said premisses to hold to them and their heirs; for the purpose of making tenants to the præcipe in order to suffer a recovery (which was afterwards suffered) and declared the same to enure to the use of Sir *Edward* for 99 years, if, *&c. sans waste* (chargeable with an annuity of 100*l.* to *Diana* if she survived *William*) remainder to *G. A. H.* and *I.* in trust to preserve, *&c.* remainder to use of *William* for 99 years, if *&c.* remainder to his 1st and other sons in tail male, *&c.*—Whereupon the said master conceived, that by the indenture of 25 *July* 1676, Sir *Edward* had a full and sufficient power of charging all the premisses therein contained with any portion or sum not exceeding 1000*l.* and that by the deed of 27 *Jan.* 1704, Sir *Edward* being minded to bar the uses and remainders in the settlement of 1676, prevailed on the trustees to surrender their interest therein, which said surrender the said master took to be invalid in law, by reason that Sir *Edward* was then living and had in no ways surrendered his term and estate, and consequently no estate ever vested in the trustees, it not being to commence until after the determination of Sir *Edward*'s estate. And the said master did conceive that in the recoveries suffered upon the deed of 1709, there wanted a good tenant to the præcipe, by reason that Sir *Edward* had by no precedent act surrendered the estate which he had by the settlement of 1679, but *eo instanti* that he executed the deeds of 1709, together with *William* his son, it operated as a surrender, and his estate was determined and vested in *A.* the surviving trustee of the first settlement, which *A.* was made a party to the deeds of 1709, but never executed the same, and he not joining with Sir *Edward*,

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Diversity between powers annexed to an estate, and such as are collateral thereto; the first pass with the estate, the second not. (*z*)

There are two sorts of powers, one annexed to the estate, as a power to make leases, &c. which is destroyed by parting with the estate; another which may be termed collateral to the estate, as this power of charging it with money; and this last *A.* would have had, tho' he should have survived the term of 99 years; for still he might have charged the premisses therewith; so might he have done, though he had assigned over the term; but having joined in the new settlement, he must not now derogate from his own act, or undo what he has done before.

One devises a legacy out of a fund, which fails, whether and in what cases the legacy shall be paid out of the personal estate.

Then another question arose upon the will of *A.* whereby he had bequeathed 1000*l.* to *J. S.* out of these lands; and it was insisted, that though this might not be good as a charge, it should nevertheless take effect as a legacy, which was not hurt by making an additional security for it; and therefore if one should grant an annuity out of the manor of *Dale*, to which he had no title, though this could not operate as a charge upon the manor, yet would it be good as a grant of an annuity to charge the person; for that the main intent of the testator being to give this legacy to *J. S.* the legatee should have it one way or another, either out of the land or personal estate.

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Lord Chancellor. Here is a particular provision for this legacy of 1000*l.* Now it is possible for a legacy to be charged in such a manner upon a certain fund, as that upon its failing, the legacy shall be lost. It is material, that this bequest is grounded upon a power, and may be thought no more than the execution of that power, which, if void, must of course be a void bequest also. It is likewise observable, that the will gives the residue to the testator's eldest son: so that to

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William and *Diana* in the conveyance to *C.* and *D.* no freehold ever vested in them, and therefore the said settlement of 1676, must be still subsisting and valid, and therefore the said master conceived that Sir *Edward* had still a good power of charging the premisses with the said two sums of 500*l.* and appointed it to be paid accordingly.—To this report Sir *Edward Blacket* (2d son of Sir *Edward*, senior) excepted, for that the master should have certified that the recovery was well suffered, and that the power of Sir *Edward* senior, under the settlement of 1676, was thereby extinguished. And the Lord Chancellor allowed the exception, but upon the further directions, decreed the two sums of 500*l.* to be paid out of the father's personal estate. Reg. Lib. B. 1719. fo. 497. and 1721. fo. 181.—As to the nature of the estate which the trustees in this case had, vide *Smith* on demise of *Dormer* v. *Parkhurst*, 3 Atk. 135.

(*z*) See Sugd. Pow. Ch. 1. sect. 5.

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make this legacy good, the child who is the legatee, and otherwise provided for, must take it away from another child, and what makes it still harder in the principal case is, that the legacy would by this means be taken away from an heir, in order to be given to a younger child. A charge upon land seems not to be so strong as a gift of a legacy.

But at length it weighed with the court, that the value of this land was so considerable as to amount to 1000*l. per ann.* and the design appeared to be, to leave the younger child the two several sums of 1000*l.* one charged by express words upon the personal estate, and the other upon the land; *his Lordship* saying, that if a legacy was given to *J. S.* to be paid out of such a particular debt, and there should not appear to be any such debt, or the fund fail, still the legacy (1) ought to be paid, and the failing of the (*a*) *modus* appointed for payment should not defeat the legacy itself.

(*a*) Vide Swin. 127.

(1) Vide *Rider* v. *Wager*, post. Vol. II. 330. *Ellis* v. *Walker*, Amb. 309. *Attorney General* v. *Parkin*, ib. 566. *Ashburner* v. *Macguire*, 2 Bro. C. C. 108. (*z*)

(*z*) See *Thomond* v. *Suffolk*, ante 464. *Fowler* v. *Willoughby*, 2 S. & S. 354.

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CASE 226.

TROTT *versus* DAWSON, *et è contra.*

A. is a trustee for *B.* as to an estate. *A.* lays out money in relation to the trust-estate; after which *B.* assigns the trust to *C.* who brings a bill for a conveyance of the estate; *C.* shall have no conveyance until *A.* is paid all his money by him expended or due in relation to the premisses.

THE plaintiff was a trustee for one *Archdale*, as to an eighth of the proprietorship of the province of *Carolina*, and was put to great trouble and charge in relation to the affairs of the province. This business, charge and trouble was all undergone during such time as *Archdale* was the *cestui que trust*, and afterwards *Archdale* assigned his interest to the defendant, who being sued by the plaintiff *Trott* for the money expended by him in relation to the premisses, brought his cross bill against the plaintiff the trustee, in order to compel him to convey over the trust estate to the defendant, who, as was insisted, ought not to allow for any of this charge and trouble, which was all upon the credit of *Archdale*.

Lord Chancellor: Dawson the assignee of *Archdale* cannot be in a better case than *Archdale*, under whom he claims; wherefore as *Archdale* would not have had the assistance of a

court of equity, without paying for the charge and trouble which *Trott* had been at in relation to this trust: so by a parity of reason the defendant *Dawson*, as claiming under *Archdale* must do the same thing, which it was incumbent upon *Archdale* to have done. (1)

TROTT *v.* DAWSON.

(1) This decree was reversed on appeal to the Lords 27th *March*, 1729. 3 Bro. P. C. 449. where the case is reported much more at length.

BENGER *versus* DREW.

CASE 227.

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LORD MACCLESFIELD.

2 Eq. Ca. Ab. 227. pl. 8. 739. pl. 5. Where in a grant of a copyhold for three lives, viz. to the husband and wife and a third person, the fine was mentioned to be Paid by the husband and wife: This, there being no full evidence to the contrary, made the third person only a trustee for the husband and wife, and the survivor of them.

SOME copyhold lands held of a West country manor were granted by copy to the husband and wife, and *J. S.* for their several lives *successivè*, and by the copy it appeared that the fine paid to the lord of the manor was the money of the husband and wife.

Lord Chancellor: This third person (*J. S.*) named in the grant is in equity to be intended but as a trustee for the husband and wife, and the survivor of them, by whom the purchase money was advanced (*z*), and it being mentioned in the copy that the fine was paid by the husband and wife, is strong evidence of the fact's being so; which though the court will not look upon as conclusive, yet any evidence given to contradict it, ought, in order to prevail, to be very clear and full. (1)

(1) *Withers* v. *Withers*, Amb. 151. (*y*)

(*z*) *Rider* v. *Kidder*, 10 Ves. 366. *Murless* v. *Franklin*, 1 Swan. 18. And see *Lamplugh* v. *Lamplugh*, ante 112.

(*y*) *How* v. *How*, 1 Vern. 415.

CASE 228.

WOOD *versus* STORY *and* BELL.

LORD MACCLESFIELD.

2 Eq. Ca. Ab. 67. pl. 2. The court allowed a Quaker to put in his answer without oath or affirmation where the bill appeared frivolous.

THE defendant *Story* was a quaker, and of so tender a conscience, that he could not prevail with himself either to swear or affirm. The plaintiff brought a groundless bill against him to be relieved touching the sum of 44*l.* 2*s.* for two shares in the *Pennsylvanian* company, of which two shares the plaintiff was purchaser; but it appeared that the other defendant *Bell* sold these shares to the plaintiff, and received of him the purchase money.

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The defendant *Story* was committed for not answering; and now on his petition to be admitted to answer without oath or affirmation:

Lord Chancellor: Nothing can more pervert justice than to make a court of justice and the process thereof a means of oppression; and whenever that appears to be the case, I will relieve the party oppressed.

Let the defendant be discharged out of custody, and his answer taken without oath or affirmation.

Note: It was said that the like order had been made by the Lord *Harcourt* in Dr. *Heathcote*'s case.

CASE 229.

1. Keen. 364. 25. Ch. D 746.

Ex Parte LEE.

LORD CHANCELLOR MACCLESFIELD.

2 Eq. Ca. Ab. 97. pl. 3. An assignee or indorsee of a bankrupt's notes at an under value is a creditor for the full sums of the notes, and may sue out a commission as a creditor for such full sums. (*z*) *Secus*, of an assignee of a bond, or where the indorsement of the note is subsequent to the bankruptcy.

J. S. petitioned to take out a commission of bankruptcy against *Lee*, and his debt (amounting to 100*l.*) appeared to consist of notes made payable by the bankrupt to other persons who had indorsed them to the petitioner, and to have been bought in by him at 10*s.* in the pound; upon which it was objected that such creditor who came by his debt in this manner, was not entitled to sue out a commission.

Lord Chancellor: Though the petitioner for this commission has thus gained the notes given by the bankrupt, yet he is plainly a creditor, just as if the persons, to whom the bankrupt

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(*z*) See *Ex parte King*, Cook's Bank. Laws. 7th edit. 168. *Ex parte Crosley*, ib. & 3 Bro. C. C. 237. *Ex parte Bloxham*, 6 Ves. 449. 600.

before his bankruptcy gave these notes, had paid an under-rate for them; nay though they had been given without any consideration, yet are they now become his debts, and the legal right thereto vested in the indorsee. *Secus*, in case of an assignment of a bond, forasmuch as such assignee, not being the legal creditor, could not have taken out a commission. Also, had the indorsement in the principal case been made after the bankruptcy, it might be a question whether such indorsee would be intitled to a commission; he not being a creditor for 100*l.* or capable of taking out a commission at the time of the party's becoming a bankrupt. (1)

EX PARTE LEE. [783]

(1) Sed vide *Ex parte Thomas*, 1 Atk. 73. *Anon.* 2 Wils. 135. *Bingley* v. *Maddison*, 1 Cook's Bank. Laws, 2d edit. 22. (*z*)

(*z*) *Brett* v *Levett*, 13 East, 213.

1907. 1. Ch. 473.

ACHERLEY *versus* WHEELER AND VERNON.† CASE 230.

THE bill was to recover the interest of a legacy of 6000*l.* given to the plaintiff by the will of her uncle Mr. *Vernon*.

LORD MACCLESFIELD. 9 Mod. 68. 10 Mod. 518. Fort. 183.

Com. Rep. 381. 513. 2 Eq. Ca. Ab. 209. pl. 2. 565. pl. 5. *A.* amongst other legacies, leaves 1000*l.* to his niece *B.* at 18 or marriage, and gives the residue of his personal estate to be laid out in land, and settled in strict settlement on *C.* for 99 years, remainder to his first son, &c. in tail; afterwards *A.* by codicil devises that the 1000*l.* given by his will to his said niece should be made up 6000*l.* payable at 21 or marriage. The niece was 18 at the time of the testator's making his codicil, and under 21. Decreed she should have the interest of the 6000*l.* from the death of the testator, (*z*) and that *C.* was only intitled to the residue exclusive of the 6000*l.*

Mr. *Vernon*, the eminent Chancery counsel, by will (1)

† This case is misplaced in point of time, not having been decreed until the *Trinity* term following.

(1) The will and codicil of Mr. *Vernon*, are more fully stated in 3 Bro. P. C. 107, but the appeal there reported was not in this cause, nor was this point at all litigated there.

(*z*) This has always been considered as a peculiar case, and to be supported only on the ground that the testator had placed himself in *loco parentis* to his niece, *Heath* v. *Perry*, 3 Atk. 103. *Ellis* v. *Ellis*, 1 Sch. & L. 5. And see *Harvey* v. *Harvey*, post. Vol. II. 21. *Taylor* v. *Johnson*, ib. 504. *Crickett* v. *Dolby*, 3 Ves. 14. *Tyrrell* v. *Tyrrell*, 4 Ves. 5.

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dated the 17th of *January* 1711, bequeathed to his sister's daughter the plaintiff *Lætitia Acherley* 1000*l.* at her age of 18, or marriage, which should first happen, and after some legacies gave the residue of his personal, and all his real estate, to the defendant *Wheeler* and others, in trust (the personal estate being first invested in land) to settle the whole on the defendant *Bowater Vernon* for 99 years, if he should so long live, remainder to trustees during his life, to preserve contingent remainders, remainder to his first and other sons successively in tail male, remainder over in like manner to the brother of the defendant *Bowater Vernon.*

[784] Afterwards, by a codicil dated the 2d of *February* 1720, the testator appointed that the portion of 1000*l.* given by his will to his niece the plaintiff *Lætitia,* should be made up in the whole the sum of 6000*l.* and payable to her at her age of 21 or marriage, which should first happen, to be in lieu and satisfaction of all she might claim out of his real or personal estate, and upon condition that she should release all right and title thereunto unto the executors and trustees in the will named.

The testator died without issue, leaving his sister *Elizabeth Acherley* the plaintiff's mother his heir at law, the defendant *Wheeler* and others executors in trust, and the plaintiff *Lætitia* about 18 years of age, who now brought this bill, praying that she might have interest paid her for the 6000*l.* until her age of 21 or marriage, at which time she was entitled to the principal.

Object. Interest is in its nature demandable for non-payment of a thing when due; whereas this legacy of 6000*l.* is not due until the plaintiff's age of 21 or marriage, consequently no interest can be claimed until such time as she would be entitled to the principal. Farther by the terms of the codicil she is to release all right or title to the testator's real or personal estate, which it does not appear she has done, nor has she offered so to do by her bill; besides, by the devise of the residue, the interest of the 6000*l.* does pass, which cannot be *debitum in præsenti, solvendum in futuro,* as it comes in lieu of the original legacy of 1000*l.* given to the plaintiff by the will at her age of 18 or marriage, which sum by the codicil is ordered to be made up 6000*l.* and notwithstanding there are the words added to it, *payable at* 21 or *marriage,* yet the legacy by the codicil ought to follow the nature of the original one

[785] given by the will, though increased and made a greater sum; for which reason till the principal becomes due, the interest thereof belongs to the residuary legatee.

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On the other side it was argued, first, that the legacy of 6000*l.* was by the will and codicil severed from the heap and bulk of this great estate; for after the several legacies given by the will, the rest and residue of the testator's real and personal estate is devised to trustees in trust to be settled on the testator's cousin *Bowater* for 99 years, remainder to trustees during his life, &c. remainder to his first, &c. son in tail male successively, &c. so that nothing was intended to be laid out in land but the rest and residue after all the legacies paid, consequently this 6000*l.* given by Mr. *Vernon* to his niece *Acherley*, was never intended to be invested in a purchase, which was said to be acknowledged by Mr. *Bowater Vernon*'s own answer.

2*dly*, As to the condition that the plaintiff should release all her right to the real and personal estate of the testator, it was plain she could have no right during the life of her mother, who was the sister and heir of the testator; also she might marry while an infant, by which means her legacy might become due, and she not capable of releasing, or might intermarry with an infant, and so neither she nor her husband be capable of releasing, and yet the legacy due; wherefore supposing it to be a condition, it could be no more than a condition subsequent, *quod cur' concessit.*

3*dly*, It was insisted that there was a clause in the codicil, which made this case still stronger for the plaintiff, *viz.* that the testator after all his other debts and legacies, "willed that "out of the surplus of his personal estate, the sum of 1000*l.* "should be put apart for the benefit of the poor of *Hanbury* "and *Shrawley*, to be kept as a perpetual stock for buying "gowns for poor old men and women, and coals and other [786] "fuel in the winter." Now this shewed that immediately on the testator's death it was intended monies sufficient should be set apart to pay all the legacies; for till then it could not be known what the surplus was; and even out of such surplus 1000*l.* was to be appropriated to this charity, and only the residue to be invested in land, and settled *ut supra.*

That supposing the fund out of which this 6000*l.* was to be paid had consisted of mortgages carrying interest, since Mr. *Bowater Vernon* could not have the interest thereof, (as plainly he could not, being entitled to the interest of nothing but what was to be laid out in land,) it followed of necessity that the legatee the niece ought to have it.

ACHERLEY v. WHEELER.

And the case of *Bourne* v. (1) *Tynte*, reported 2 Vent. 346, was on this occasion cited as taken from the register's book, being insisted on to be much stronger than the principal case; it was thus:

Roger Bourne having lands of 500*l. per ann.* and a personal estate of 8000*l.* owing to him upon mortgages, &c. and having no child then living, by his will devised to Sir *Haswell Tynte* and others (whom he made executors) and their heirs, all his lands, and personal estate secured by mortgages, &c. in trust to lay out all his personal estate, which should remain after his debts and legacies paid, in the purchase of lands to be settled on the testator's sons (if any) in tail, remainder to his brother *Gilbert Bourne* for life, with remainder over to the said *Gilbert*'s sons, &c. he devised, that in case the child his wife was then big withal should be a daughter, she to have 1000*l.* to be paid at 21 or marriage, and if she should marry with consent, &c. then her portion to be augmented to 3000*l.* which sum should be secured and kept for that purpose out of
[787] his mortgage money, and other securities, to be paid her at her age of 21 or marriage; his wife to have the education of his daughter, and out of the interest of the 3000*l.* to receive 80*l. per annum* from the trustees for that purpose; that in case the daughter should die before marriage or 21, then her portion and all monies so devised to her, to be employed for the benefit of such persons as were to enjoy his lands according to his will, directing that the rest of his personal estate not given or disposed of by his will, should be *all of it* laid out in land and settled as aforesaid. After the testator's death a daughter was born, and the executors for about eight years paid the interest of the 3000*l.* above the 80*l. viz.* 100*l. per annum* to *Gilbert* the brother; but being then better advised stopt payment; upon which *Gilbert* the brother brought his bill to recover the interest above the 80*l. per annum*, insisting that the rest of the personal estate being *all of it* to be laid out in land, this did by express words, or by a necessary implication, include all the interest of the 3000*l.* above the 80*l. per annum:* that there was a contingency in this case importing a condition precedent, *viz.* that if the daughter should die before 21 or marriage, the whole 3000*l.* was to be laid out in land.

But in that case the Lord Chancellor (*Finch*) declared that

(1) Lord *Hardwicke* expresses some disapprobation of this case, in *Heath* v. *Perry*, 3 Atk. 102.

it was never the testator's intention the 3000*l.* should be laid out in land, or that *Gilbert* his brother should have any benefit thereby in case a daughter was born, which had happened; that *Gilbert* the brother's suit was both unnecessary and unkind, in regard he had a very good estate in lands of inheritance from the testator who had no obligation to leave the same to him: wherefore his Lordship decreed that *Gilbert* the brother should repay what he had received, that the trustees should pay the interest of the 3000*l.* (above the 80*l. per annum*) for the benefit and advantage of the daughter till 21 or [788] marriage; and also pay the 3000*l.* at the time limited by the will.

Now this case was said to be stronger than the principal one, 1*st*, In that here was an express provision of 80*l. per annum* to the mother for the education of the daughter, which might by implication be thought to exclude the daughter from any farther advantage of her portion, until she should come to the age of 21 or marry, at which time the portion was to become due.

Also in the case cited the legacy was not vested; but if the daughter should die before 21 or marriage, then it was to sink. Whereas in the principal case there was a vested legacy transmissible to executors, though the plaintiff *Lætitia* should die before 21 or marriage.

Again, the devise there was to a brother, but here to a remoter relation, and out of a much larger fund.

The *Lord Chancellor*, having taken time to consider of the case, declared that the plaintiff *Lætitia* was entitled to the interest of the 6000*l.* from the death of the testator, saying, it had weight with him, that by the will the 1000*l.* legacy left to the plaintiff was given her at 18, but she coming to that age in the testator's life-time, the codicil ordered it to be made up 6000*l.* yet not to be paid until 21 or marriage; so that though the actual payment was stopt until 21 or marriage, it was however vested presently, and being severed from the rest of the estate, which *residuum* only the defendant *Bowater Vernon* was concerned in, therefore the interest of the 6000*l.* from the death of the testator could belong to none but the plaintiff *Lætitia:* which was decreed accordingly. (1)

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(1) Vide *Nicholls* v. *Osborne*, post. Vol. II. 419.

THE END OF THE FIRST VOLUME.

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